

THE INDONESIAN QUARTERLY

Current Events

The Strategic Implications of the Economic Crisis in East Asia

Review of Political Development

Sailing on the Wave: Indonesia's Recent Social and
Political Situation

Articles

Southeast Asia and the Social Agenda: Critical Policy Responses

ASEAN's Future

Myanmar in ASEAN: Challenges and Prospects

Socio Economic and Political Bases of the Nahdlatul Ulama Elite

The Current Legal Status of Transit Passage:
Analysis of State Practice Before and After the LOSC



The Quarterly

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The Logo



To better represent the underlying ideas that gave birth to the CSIS in 1971 the Centre uses as of 1989 the logo that figures on the front cover of this journal. The original, in bronze, designed by G. Sidharta, it consists of a disc with an engraving that depicts the globe which serves as a background to a naked man with an open book laid on a cloth over his lap, his left hand pointing into the book, his right hand raised upwards. Altogether it symbolises the Centre's nature as an institution where people think, learn and communicate their knowledge to whoever are interested, to share it with them, mankind the world over being their concern and the globe their horizon. The nakedness symbolises the open-mindedness, the absence of prejudice, in the attitude of the scholars who work with the Centre, just as it is with scholars everywhere. The inscription reads "*Nalar Ajar Terusan Budi*", which in the Javanese language essentially means that to think and to share knowledge are only the natural consequence of an enlightened mind. It is a *surya sengkala*, that is *chandra sengkala*, a Javanese traditional way to symbolise a memorable year in the lunar calendar, adapted to the solar calendar system. It consists in using words that express the perceived meaning of the commemorated year while marking the year at the same time, each word having a numerical value. Thus, the inscription, in reverse order, represents the year the CSIS was established: 1971.

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Contents

Current Events

- The Strategic Implications of
the Economic Crisis in East Asia
Jusuf Wanandi 2

- ASEAN's Future
Jusuf Wanandi 21

- Myanmar in ASEAN:
Challenges and Prospects
Aderemi Isola Ajibewa 28

Review of Political Development

- Sailing on the Wave:
Indonesia's Recent Social and
Political Situation
Medelina K. Hendytio 7

- Socio Economic and Political
Bases of the Nahdlatul Ulama
Elite
Kacung Marijan 37

Articles

- Southeast Asia and the Social
Agenda: Critical Policy
Responses
Marzuki Darusman 14

- The Current Legal Status of
Transit Passage: Analysis of
State Practice Before and After
the LOSC
Farhad Talaie 52

Current Events

The Strategic Implications of the Economic Crisis in East Asia

Jusuf Wanandi

THERE are several possible implications of the economic crisis in the strategic realm. It has to be said at the outset that the conclusions below are still tentative as the changes still have to be worked out through the system. The first level of change is in the relative balance of power among the great powers of the region, particularly the US, Japan, and China. The US, with its overwhelming political, economic and military power has become more powerful and influential in the region as a result of the economic crisis, because it has been the most active one in taking leadership in looking for a solution, although in the beginning it showed some hesitation in relation to the Thai crisis. That was because at that time no officials were in place at the State Department, while the Treasury Department that had taken the lead on the issue was not really sensitive to the needs of the region.

As usual the US role is always considered controversial. Whether they do something or they are inactive, criticisms are al-

ways directed at the world's only super-power. That is why a greater role of the US in the region for the future is to a certain extent a double-edged sword. On the one hand they are expected to have a greater role in the region to overcome the crisis, but on the other hand there is the concern about US domination in the region. A backlash could happen against the US because of her increasing role in the future. There is also the possibility that the crisis will result in a new nationalist backlash due to the resistance on the part of new developing countries to new interventions in their domestic developments resulting from globalisation as well as heightened feelings of injustice caused by the economic crisis that happens so suddenly. In these circumstances it is not easy to have a balanced view of what really has happened as one does not usually recognise one's own deficiencies. An increasing US role is inevitable, since there are no other powers that have the same reach and leadership in the region. There is another danger about US involvement in the region for the future. This relates to

its lack of consistency and staying power, due to some large extent to an inward looking US public, the tendency on the part of the US to take unilateralist actions, and the possibility of a lack of interest on the part of the Executive Branch, while a new bi-partisan consensus on foreign policy has not yet emerged after the ending of the Cold War.

Japan, the second most powerful economy in the world, has been expected to take the lead in the economic recovery of East Asia. This could be undertaken by re-flating her own domestic economy, which has been dormant for the last 8 to 9 years. The economy was not in a prolonged recession and was not experiencing real robust growth either. That is why there was no real sense of crisis in Japanese public opinion. As Japan has been able to achieve a very high real per capita income after a growth for over 30 years, there also was no sense of urgency to stimulate the economy. This has been compounded by the fact that Japan has no strong political leadership although for the time being the LDP seems to remain unchallenged.

Japan began with a wrong initiative by proposing a special Asian Fund to be established at the Annual Meeting of the IMF-IBRD in Hong Kong, September 1997. *First*, the initiative was taken without the consent of the US and the other G-7 members. *Second*, it was meant to be a Special Fund for Asia to be arranged outside the IMF and will be made more readily available. The idea was rejected by the other G-7, especially the US, but other Asian countries were not very supportive either because the proposal was not made very clear to them. The idea of an Asian Fund

was amended in early November by some APEC countries to become a complementary effort to the IMF Fund and as an early warning system. However, the idea was no longer considered relevant. Even after another discussion at the ASEAN Finance Ministers Meeting in Kuala Lumpur in December it could not get off the ground.

In the case of the crisis in Thailand and Indonesia, Japan has been supportive as part of the deal with the IMF. Japan has been willing to do more in providing additional aid to Indonesia to alleviate the plight of the poor in the form of food-aid and medicine. It also provides assistance to overcome the problem of the rejection of L/Cs from Indonesia due to a loss of international confidence on Indonesia's banking system. However, Japan has not been forthcoming on the opening up of her domestic market through a reflation and greater liberalisation of the domestic economy. This was made clear at the ASEAN Informal Summit in Kuala Lumpur in December 1997. This has been the main reason for the criticisms by the G-7 and others in Asia towards Japan. A reflation of Japan's economy and the opening of her market could be the most important help for the depressed Asian economies to get out of their crisis. Although Japan is quite willing to help the Asian economies to overcome the crisis, her leadership role is both not quite visible and not fully acceptable. This might be due to her own domestic political constraints and leadership problems and could also be due to being ill-prepared in fulfilling such a role. There is a feeling of a real lacuna in Japan's leadership in this crisis, which after all is an economic one and is happening in East Asia

and therefore should be of great concern to Japan. This suggests that Japan really has to prepare herself and to get her act together now in order to play a leadership role for the future developments of the region.

China, at the very least, has shown some understanding about the expectations of the region and the world regarding her leadership and policies to assist the East Asian economic in resolving their crisis, although she is completely new in this game. *First*, she participated for the first time in providing financial assistance to Thailand as part of the IMF deal, and also made a pledge to support the IMF financial package for Indonesia. *Second*, she understood that another devaluation of the Renminbi now will mean another blow to the other Asian currencies, including to the Hong Kong dollar. Therefore she has promised not to do that and she has enough reserves (of about 140 billion dollars) to back up that promise at least for 1998. She also understood gradually, after being rather nonchalant about the minimal impact of the currency crisis on China, that it can have a serious impact on her own economic development and policies. That is why they started to study the phenomenon more seriously since November 1997, and why it is so important to have stronger policies on domestic investments and to have less regulations as well as to have a strong technocratic team under PM Zhu Rongji to manage their economy. Here, as in the case of Japan, the most important policy should be on how to keep the economy in order, and in that way help the other East Asian ones by not burdening them with another crisis of a big economy such as China's.

In the meantime, if China could manage her economy well, despite deflationary pressures due to reduced foreign investments (by a third in 1998 compared to last year) and a declining trade surplus (50 per cent of her trade is with East Asia whose economies are slowing down), then in political and strategic terms China will increase her weight relatively to the rest of East Asia. This also means that her military might also increase relatively. How she is going to use this relative increase in political and strategic weight will be an important factor in the strategic balance of the region in the future.

It was therefore encouraging that China has not only had good relations with the region and has become more involved, particularly with ASEAN, bilaterally as well as through multilateral frameworks such as the ASEAN Regional Forum (ARF) as well as CSCAP (Council for Security Cooperation in the Asia Pacific), a second track level of cooperation for the ARF. However, two of their policies in dealing with the situation in the region stand out. One is to improve relations with Taiwan through bilateral dialogues following tense relations for the last two years due to the visit of Lee Teng Hui to the US. This effort has been undertaken after Taiwan has increased her economic diplomacy in East Asia with the promise of helping to resolve the crisis. Initially China reacted negatively to these Taiwanese activities, but the reactions were moderate because she does understand that the economic participation of Taiwan in the region could help to overcome the economic crisis of East Asia. In the meantime, China also understands that the economic approaches and

activities from Taiwan will not lead to the establishment of diplomatic relations.

The other policy relates to her mature reactions towards the riots in Indonesia, where Indonesian Chinese shops were attacked and damaged. Her new policy on the so-called "overseas Chinese" in South East Asia, recognizing that most of them have chosen the local citizenship, suggests that China would not repeat her policy of solidarity as in 1958 and 1965. This shows the importance of her bilateral relations with the countries of ASEAN. In the longer term China of course will become a powerful country strategically in East Asia. If in the meantime she also could become a responsible power, abiding by the rules of international relations, then she should become a beneficial and responsible great power. If political development also occurs domestically in the direction of a more democratic country based on the rule of law, this would strengthen her moderating role in the future.

Meanwhile, a strong US presence in the region is always a prerequisite for a healthy and positive balance of power in the region. And since that is to be maintained primarily through the US-Japan alliance, it has become a real anchor for peace and stability in the region, although burdensharing with others in the region, including ASEAN, is also becoming more important for keeping the support for the alliance in the US and Japan.

Strong regional economic growth and dynamism are another important factor for peace and stability to be maintained in the region. That is why a relative quick and adequate response of the region towards the

economic crisis is of strategic importance, especially because the underlying factors for regaining growth are present. These include high savings, natural resources endowments, educated and trained labour, export led growth and open economics, and becoming a part of the globalised economy. This crisis has also demonstrated the important role of regional and global institutions such as the IMF and the IBRD. It has yet to be shown that the region can cooperate with them by biting the bullet and taking the bitter medicine and with regional and international assistance it can return to the growth path and economic dynamism. However, it is a condition sine qua non that governments as well as the private sector in the region recognise the real problem, including the follies and excesses that have been made.

What about ASEAN's relative influence in the future, now that the crisis has hit the members quite hard? ASEAN has been seen as a regional institution that has had a positive impact on the region's developments due to her initiatives for peace and stability, supported by dynamic economic growth and cohesive cooperation among its members. That explains why ASEAN was able to take initiative in APEC, ARF and ASEM. Now that she is in an economic crisis, and with some of the members becoming more feeble socially and politically, ASEAN is challenged to be able to show that she can sustain her support for regional institutions she has helped create by devoting sufficient financial and human resources. More than that she has to show her ability to make ASEAN even more relevant to the region by making changes that would convince the region

that she is better organised and can co-operate more deeply. Because of the economic crisis ASEAN has done little for the region lately.

ASEAN has been criticised for her inability to tackle the haze problem caused by Indonesia which has created havoc among the other members of ASEAN. Little appears to have been done to prevent this from happening in the future. Similarly, on other new issues such as the migration problem and illicit drug-trafficking in the region, the present ASEAN cannot do very much about. Another question is how ASEAN will handle Cambodia's membership in the future, while facing strains due to the enlargement of ASEAN. Only if ASEAN makes substantial changes, can she cope with the new and fundamental challenges in the future and maintain her relevance to her own members, societies as well as to the greater East Asian and Asia Pacific region.

This means that ASEAN has to become more than a regional institution based on state to state relations. She has to become a community based on the principles of a democratic and just society as well as humanitarian, open nationalism, and regionalism. Therefore "constructive involvement" in each others domestic affairs for the greater good of the region should become an acceptable way. ASEAN should establish more institutions to be able to cope with the new challenges, while her decision-making process should be based on consensus only with regard to essential problems whereas on others it could be decided upon by majority vote. ASEAN also has to incorporate more of the civil societies that are already cooperating amongst themselves. Only then could ASEAN regain an influence in the greater region of East Asia and the Asia Pacific, and could it continue to lead in regional institutions that she has initiated.

Review of Political Development

Sailing on the Wave Indonesia's Recent Social and Political Situation

Medelina K. Hendytio

Introduction

THE development of Social and Politics in Indonesia in the last three months (December 1997 - February 1998) has been characterised by a turbulent situation and crisis. This situation emerged as economic crisis, the worst since Soeharto came to power three decades ago, interwoven with the rising of political temperature. The national discussion on succession issue, broad speculation on the next vice president and the increasing number of riots and demonstration in the face of deepening economic crisis are indicative of the complicated social and political atmosphere.

The raise of political temperature is mostly due to the upcoming general session of the People's Consultative Assembly (MPR) which will be held in March to elect the president and vice president. In this context, it is hard to say whether political or economic phenomenon has contributed a

stronger impact in creating the chaotic situation. The obvious message that can be taken out from the current situation is the stronger call for both economic and political reforms. These reforms are needed since the current economic crisis has been caused by the lack of confidence in both the economic and political sectors. This means that any solution offered by the government to the economic downturn would be ineffective unless it is accompanied by political reform.

Economic Crisis

The economic disaster faced by Indonesia can not be separated from the crisis happened in the Asia region. Started with the fall of Thai baht in the mid last year, it spreaded out to the other countries in the Asia region like a contagious disease. Without exception, Indonesia has been hit by the same condition. The rupiah has been continuing to fall since July 1997. At the end of November 1997 rupiah down

to level of 4000 to one US dollar and then hit another historic low of 7,750 in the following weeks. Rupiah's persistent fall was mostly caused by the president's health after the presidential doctors advised him to rest in December after an exhausting international tour. Moreover, the government's draft 1998/1999 budget and President Soeharto's speech in January 6th were expected to serve a turning point to the country's economic woes. The draft shows that Indonesia is in situation where the country is forced to tighten the belts and implement austerity measures. Moreover, it also exhibits that the development funding depends heavily on external factors. Funds allocated for debt payment in the current draft budget rose from 19.23 trillion up to the Rp30.24 trillion. However, after his budget speech the rupiah went into free fall at one point touching a rate of 11,000 to the dollar, less than a quarter of its value six months earlier. This leads to the fearing hyperinflation and food shortages, besieged markets and struffed-shop shelves. Furthermore, the value of shares traded on the Jakarta stock exchange fell drastically that even some reputable companies were technically bankrupt. Meanwhile, the economic deterioration is happening, the continuing fall of the rupiah resulted in lay off and a decline in production at most industrial companies.

Many people have questioned why the Indonesian rupiah continues to wane against the US dollar although the government has assumed the implementation of the appropriate economic policies. The cause of the confidence crisis describes that the issue of implementation and credibility of a crisis management theme has not been resolved.

In order to restore confidence, the Government went to the International Monetary Fund (IMF). On January 15th the IMF announced a new reform agreement covering 50 items of actions that should be carried out by Indonesia. The President personally signed and delivered the letter of intent to the IMF and gave his personal stamp on these reforms. This showed the government's seriousness over reform and is ready to carry out the most extensive and drastic measures since the government embarked on the course of economic reform in the mid-80's. The most outstanding feature of the economic reform package was the elimination of monopolistic privileges and cartel practices, the phasing out of subsidies and cancellation of the lavish project. Moreover, national programs that could no longer be subsidized such as National car and IPTN were included in the package as well. IMF also suggested a revision for the state budgeted draft. The basic assumption used in the earlier draft of the state budgeted 1997/1998 was that: Rp4,000 for one dollar, inflation rate at 11 per cent and growth are expected 4 per cent. This basic assumption has been changed by using Rp5,000 for one dollar, 20 per cent inflation rate and zero growth.

However, the market has not respond positively. Rupiah is still weak against the US dollar. This reflected the increased social and political risk associated with unstable regime. The devalued currency pushes up the prices of imports while food prices are rising because farmers have been hit by a prolong drought. At the same time the country has also been experiencing an unemployment crisis. By the end of 1997, the number of unemployment had already stood

at 4.4 million, in addition, 900,000 people are estimated to have lost their jobs this year alone. If the economic crisis does not recover soon, the total number of unemployed people will reach around 8 million people. The following consequence of this condition is the higher chance for Indonesia to be hit by social unrest or riots.

In responding to this problem, the government has created a labor intensive project funded by the government itself and the World Bank. The aim of this project is to provide jobs for the laid off workers especially from construction, industry and informal sectors. Minister of Manpower Abdul Latief said that the government would hire workers for short term jobs such as digging drainage ditches, dikes, water canal renovation, slum areas and clean water procurement. This labor intensive project is designed mainly as a "temporary cushion" to handle the unemployment crisis which has gripped the city over the past few months. One critic of the project is that the process was taking too much time. Furthermore, the city cannot possibly take care of them all the time, hence, there must be a long term plan for them.

Meanwhile, the efforts to stabilize the economic condition has been continuing through the forming of Monetary Resilience Council chaired by President Soeharto and the appointment of Radius Prawiro as the President's advisor on the settlement of private sectors debt. At the same time, the leader of several countries such as the United States, Japan, Germany, Australia and Singapore called or visited President Soeharto to express their concern and willingness to ease the economic rot in Indonesia. On January 3rd, Singapore Prime Minister

Goh Chok Tong flew in to Jakarta to guarantee the letters of credit (L/Cs) issued by Indonesian banks to help Indonesia finance which is needed to import goods. Initially, there have been complaints from Indonesian importers that their L/Cs issued by local banks were rejected by foreign banks over the concerns that they could not fulfill their commitments. Therefore this condition forces Indonesia to ask other countries like Singapore to try to unlock the International system for Indonesia by guaranteeing Indonesia's letter of credit.

The last action of the economic reform efforts was the implementation plan of the Currency Board System which is seen as appropriate medicine for Indonesia and this system is expected to stabilize the rupiah as it is fixed at a certain rate against US dollar. However, up to now the system is still under evaluation mainly because of the risks of the system as well as the disapproval of the IMF against this plan.

Political Reform

As a response to the country's ailing economy, critics have intensively called for economic and political reforms, because any solution offered by the government would be ineffective unless it is based on such both reforms. The argument is based on the concerns that the current crisis is not merely a question of economic but also a matter of political trust. Hence, the government should adopt a new strategy to regain that trust especially as the country is now sinking deeper into an economic crisis.

There have been various opinions regarding how far and in what degree the po-

litical reform should be performed. Some politicians stated that the main agenda on political reform was the transparency in the succession issue. This issue emerges because the concern about the future prosperity of Indonesia now turns not so much on the health of the economy but more on the health of 76 years old President Soeharto. Many now doubt whether the strengths that have served Soeharto so well in the past will be appropriate to the new challenges (*Economist*, December 20 th, 1997). Concern over the presidential health is directly reflected from market reaction through rupiah's fluctuation.

An interesting phenomenon in Indonesian political life appeared when some critics abandoned their usual tact to call openly for the president resignation. They said that public confidence can be restored by electing new president who is in good health because Indonesia is facing a serious economic problem and more complicated problem in the globalization era (*Economist*, January 17th, 1998). The criteria for the future President have been set that he must have a good representation and credibility, well experienced in the government system, widely supported by the people and capable of mending the country's political and economic system.

A nationalist group, made up of a number of public figures hinted that Soeharto should not run again. Meanwhile one government critic, Amien Rais, even indicated that he is willing to run for presidency. Rais is an influential academic and the head of the Muhammadiyah movement, a muslim welfare organization. He has called for an probable alliance between himself, Abdurrahman Wahid leader of Nah-

dlatul Ulama (NU), the country's largest muslim organization with 30 million members, and Megawati, the daughter of Indonesian first President Soekarno. Rais pointed out that through coalition, political reform in the country would be more effective. In addition, he also called the People's Consultative Assembly (MPR) to take the initiative in settling the crisis. The MPR should establish a presidium of caretakers to temporarily take over the presidential duties while waiting for a new president to be elected in March. The presence of presidium was important because currently there is no eligible Indonesian, who is capable and acceptable to all. After that, the National Brotherhood Foundation (YKPK), for example announced its preference to see Vice President Try Sutrisno nominated for presidency because he is the most experienced and acceptable person to succeed President Soeharto. YKPK viewed that Try Sutrisno is a statesman with experienced and flawless record, and open to ideas and arguments.

However, the above scenarios were vanished when Soeharto confirmed his readiness to be nominated for his seventh consecutive term. Though some people have stated their willingness to be nominated, it has been a foregone conclusion that Soeharto would run unchallenged. This was supported by some opinion that it would be better if he did, because none could see an alternative. This in line with Marzuki Darusman of the National Human Right commission, whose statement reflect the lack of alternative figures who have the ability to replace Soeharto.

However, other politicians interpreted the political reform differently. They were

not pointing directly on the succession issue but on a more broader issue. According to them, political reform should start with concerted firm and consistent efforts to enhance good governance. This means the establishment of the government system which is fairly efficient, technically competent, highly accountable and clean from any involvement in corruption and collusion with the business community. Confidence needs to be restored through the democratization of the political and economic system. Furthermore, political reforms could only be successful if the government was willing to open itself to people's inputs in order to find necessary actions to end the crisis. In essence, political reform should institute a clear and good governance.

Another proposal pointed out that political reform measures should cover both short term and long term orientations. The short-term reform measures include the succession of the country's leadership by electing a new president and good selection of cabinet member for the upcoming 1998-2003 term. Cabinet members should be skilled personnels, honest, committed to reform, and able to work in harmony. This proposal also emphasized the importance of the empowerment of the house of representatives. In this case, the house should be able to control the government. Furthermore, it should be allowed to exercise its rights including the rights to ensure that the government is held accountably. The long term measures should also include the revision to the country's general election system. A part from being direct, free and secret, the general elections must be conducted honestly and fairly because so far the results of election have been manip-

ulated. Another issue that has been seen important is the evaluation of the dual functions of the armed forces, and the regulations on political parties. In order to develop democratization process, the tolerance of the state apparatus and the space for freedom should be open wider. The government should allow for a high degree of social control either through the mass media or other organizations, and improve the transparency of its policy-making process.

The Next Vice President

The nomination for the vice presidential candidates by political parties and several pressure groups in society has contributed to the escalation of the political temperature. Several names have been raised including incumbent Vice President Try Sutrisno, State minister of National Development Planning Ginanjar Kartasasmita, State Minister of Research and Technology B.J. Habibie, Minister of Defense Edi Sudrajat and Emil Salim. The prolonged debate on Vice Presidential candidacy is driven by an assumption that Indonesia next vice president will have a greater role in running the government (based in the condition of a political *ceteris paribus*). Compared to this traditional roles in previous administrations, the role of the next Vice President is predicted to increase. This increasing role can be assessed from Dawam Rahardjo's speculation (*Jakarta Post*, 3 November, 1997) that President Soeharto as the elected president may not serve a full time in office. If that happens, the next vice president will take place and become the new president. This process can be seen as helping President Soeharto prepares his successor.

The debate over the numerous nomination for Indonesia's next vice president from various supporters has been viewed as a good trend for social dynamism since it was also seen as a process toward a more democratic society. In supporting this tendency, the authorities announced that public and societal groups were allowed to name their own vice presidential candidates but they must channel their aspirations through the assembly. In another words, the announcements of support must follow established procedures and not against the constitution and the existing mechanism.

Besides naming the candidate, there have been so many criterias for electing the next vice president that have been established by different group in the society. Golkar has also listed a set of criteria which has been interpreted as it was pointing out to Habibie. Kosgoro, an organization affiliated with Golkar, has also released a nine point set of criteria for the next vice president. Above all, one of the crucial qualification in choosing a Vice President is his or her ability to cooperate with and be loyal to the elected president. This shows that the elected President is the dominant factor in the vice president's selection process. However, President Soeharto insisted that he would not announce his preferred running mate for another term in office before factions in the people's consultative assembly conceived their vice presidential candidates.

The long debate on the next vice presidency seemed to ceased the United Development Party (PPP) and the Indonesia Democratic Party (PDI) factions and other three factions in the People's Consultative Assembly (the ruling Golkar functional group, the Armed Forces and the regional repre-

sentatives) have now announced that the chosen candidates for President and Vice President were Soeharto and state minister of research and Technology B.J. Habibie respectively. It is almost certain that Soeharto and Habibie are the only candidate in the national leadership election.

Despite the fact that all of the five factions in the people consultative assembly had already named B.J. Habibie as their only candidate for the vice presidency, the religious social and backgrounds group called as *Gema Madani* or Echo of Civil Society nominates the former environment minister Emil Salim. The reasons for throwing the full weight behind Emil were that he was known for his clean record and piety.

People believed that this nomination did not have the slightest chance of success. However, *Gema Madani* states that they have a moral obligation to remind the people that there was a strong and able candidate than the official one. Mr. Salim also admitted that his chances of being elected as a vice president were slim but he pointed out that the people should retain the freedom to express their ideas and participate in the decision making process.

The priorities of Salim's agenda are economic reforms aimed at improving Indonesia's competitiveness in the global markets by eradicating corruption and monopolistic practices. On political reforms he stated that only if economic reforms were consistently implemented, political improvement would follow (*Jakarta Post*, 19 February 1998).

Although it is hard to envisage that Salim's moves will be successful, the initiative was a precious step as an exercise of democracy and it would be marked in the national

history as evidence of the fact, even in our present difficult situation this nation still yearned for democracy (*Jakarta Post*, 18 February, 1998).

When the national leadership topic was dominating the political arena in Indonesia, riots have been breaking out in several part in Indonesia. In East Java, for instance, unrests hit several towns, which was driven by the sudden price hike and the shortage of several basic commodities (*Jakarta Post*, January 15, 1998). Hundreds of people living in the outskirts of Jember, destroyed stores, kiosk and supermarkets which sold basic commodities. They ransacked the stores and often threw the merchandise into the streets. Price hike was used as a justification to commit such violence and destructions. Unrest also hit Pasuruan, a town 90 km east of Surabaya. The rioters demanded local stores to sell their basic commodities at cheap prices. At the same time, panic buying gripped Surabaya as people flocked to local markets and supermarkets to stock up on basic commodities. East Java Governor Basofi Soedirman alleged that the riots in the three cities were provoked by those with past communist link. If it is true that the riots and bomb hoaxes were played by a certain group which had its own political agenda as usually stated by the author-

ities, the Government is facing unpredictable and undefined problems.

Conclusion

If we consider all the condition that currently are happening in Indonesia, we can come to two totally different conclusions. *First*, what was happening now is a common nature where political temperature and tension are increasing in the face of the most important political agenda, the General Session of People's Consultative Assembly. It is hoped that as the general session of the assembly is over, the political tension will decrease. After that, all of the efforts can be maximized to manage economic problem. *Secondly*, Indonesia is facing a more structural problem both in economic and political sectors. The efforts to overcome this problem should start from identifying the root of the problem. It is not an easy task to find out what the root of the problem is. Every body may come with different analysis, and this will lead to a hundreds different solutions which could make the situation even worse. In this case, it is not enough to only use our brain. Heart is also needed to detect the real problem, and with heart too, we define the solutions.

Southeast Asia and the Social Agenda: Critical Policy Responses*

Marzuki Darusman

Sosial Space, Social Dimension, etc.

THE idea of a Southeast Asia that is related to a social agenda, as distinguished from an economic agenda, is an important development in the political-economic processes of this region. There is a need, however, to conceptualize it much more clearly both in the individual national states and the regional context of Southeast Asia. The idea does not possess a discernible history in terms of a traceable progression of the notion of social development -- of a social space aside an economic space -- with regard to the region as a whole.

The closest term to the political idea of building socially viable -- social sustainable -- entities is the official concept of regional resilience, which goes out and is assumed to result from conditions of national resilience, as defined by the area's primary organization ASEAN: The Treaty of Amity

and Cooperation in Southeast Asia of 1976 refers to "national resilience", linking this to "political, economic, socio-cultural as well as security fields". The treaty further expresses the determination of the ASEAN states, short of political union, "to cooperate in all fields for the promotion of regional resilience".

Southeast Asian issues have, for the most part of its decades-long past, been dominated by security perspectives, both during the Cold War and continuing in its aftermath. Security perceptions meshed with economic cooperation as the rationale for the formation of ASEAN. It was political cooperation, however, that subsequently came to define ASEAN cooperation. A social agenda would now then create a social dimension to that cooperation, and in that sense open up a new phase in Southeast Asian regionalism.

Social Goods, Social Problems, etc.

In the context of Southeast Asia as a developing region, the idea of a social

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agenda would need to be placed in relation to what are referred to as "non-economic" factors. These have now come to be recognized as determining elements in the whole development doctrine, so defined as if "economic" factors were so much more basic than non-economic ones. This could not be the case, however, as the search for an explanatory formula of development processes continues to revert back to dimensions other than the economic.

The terminology social agenda here is not meant to refer to the provision of social goods (such as health, education, transportation, clean drinking water etc.), as these are taken to be given factors. The term is also not intended to encompass what are known as social problems (asocial attitudes, pathological manifestations, deviant behaviour, criminal acts, etc.), which presumably are part and parcel of modernization. A social agenda in relation to a regional and developmental perspective, is defined here in the sense of social processes that underlie initiatives and collective efforts to promote and protect specific social values. It is therefore centered within the nexus of politics and democracy.

Economic development does not directly translate into poverty alleviation. Economic growth is not sufficient in reducing poverty, and special efforts need to be undertaken to do so. The primarily economic theory of "growth with equity" is not achievable, unless large scale inequities (including corruption, inefficiency etc. that are institutional aspects) are eliminated. If a general economic uplift is attained, economic equity may or may not have been

achieved. However, equity, which is thought to be attainable through what is termed "good governance", is finally a political problem. The resolution of a political problem can only be properly placed within the processes of a democracy. Therefore, reducing inequities is, by definition, political. The essential point here is, however, that if equity is eventually more or less perceived to be achieved, politics and democracy do not then become dispensable. Politics and democracy is not part of good governance; it is good governance that is part of politics and democracy.

Social Equity, Social Cohesion, etc.

A social agenda is normally assumed to be aimed at addressing the problem of equality or, rather, more explicitly, the problem of inequity. As such it is closely linked with the question of poverty and deprivation. The implicit assumption is that rectifying inequality, thus alleviating poverty, can be achieved through redistribution of wealth, which is a political problem. In fact, it is a problem of altering unfavorable social structures and power relations, modifying non-economic dimensions. A social policy agenda concerns itself with the striving to secure general conditions of equity. In principle, social policies are implemented when equality is articulated as a social goal. The problem of inequality -- which is an unacceptable condition -- in Southeast Asia is taken to being resolved within each respective state through their various national development schemes.

To the extent that national development constitute concerted efforts to create

an overall uplift of living standards and ultimately to shape the conditions of equality, they are generally, by definition, implementation of social policies. In what way, then, does the idea of a specific social agenda characterize itself? Is the formulation of a social agenda a necessity or a desirability? How feasible is it, being either one or the other: putting it into place from the start or only after a certain period of an economic process?

States in Southeast Asia have been described as being vulnerable states, that is states whose social cohesion, as a consequence of their original constitution and subsequent development, are and remain very susceptible to social dislocations. A variety of divisive factors underlie the brittle conditions of those states that are historic accidents of colonial and imperial legacies, and these would include their ethnic, religious, cultural and social compositions. While the immense diversities that make up the unique identities of states in this area may be repositories of the sense of national pride, they are at the same time perpetual sources of potential tension that could, under the most severe strain, unravel their tentative coherence. In such social contexts, implementation of policies, in general, would logically be directed in the first instance to underpin and reinforce social cohesion. State-maintaining policies, rather than social equality-augmenting policies would, thus, seem "naturally" to take precedence. It is also within the crucible of such basic plurality that the anthropology of these old-nation-new-states is embedded, thus crucially forming their concepts of human self-worth.

Integration, Social Justice, etc.

Another aspect of vulnerability relates to the strong need to reduce marked internal inequalities in the majority of Southeast Asian states, even those that have started earlier in their national reconstruction and apart from those that are presently simply poor, due to the fact that their economies are not as yet an integrating force. Just "more economics" so far has clearly not been able to make these steep inequity problems go away. It may be precisely because of these socio-economic gaps that the institution of specific social policies becomes imperative, initially nationally, eventually involving other states in the area. The question here is, if the problem of equality is being tackled internally in each state and is perceived to be a particularly national responsibility, what justifies addressing it regionally?

It is perhaps here that the issue of regional integration needs to be touched on, contrasting this mode of interaction with the predominating ASEAN ideology of cooperation as the defining relationship that regulates inter-state behaviour. Processes of integration, induced largely by industrial restructuring as a result of intensified Foreign Direct Investment (FDI) in the region, have been proceeding apace, although the region's prosperity has been achieved mainly through national-level economic policies. ASEAN regional economic cooperation has not been significant, other than its collective stance against external adversities (protectionism, social dumping, environmental degradation etc.) that have indirectly impacted positively on the national development of its members.

However, an economic driven regionalism is now having to confront integration problems, which are political by nature, originating from but going beyond the national sphere on to the regional level, besides resolving conventional issues of co-operation. These could be termed regional problems of social justice that encompass basic rural problems of landlessness, indebtedness, underemployment and urban poverty, the dynamics of which effect the interaction between the national and the regional. No Southeast Asian state is totally insulated from the political impact of these unsettled problems.

Social Rights, Social Consensus, etc.

From the above analysis, the critical policy issues that relate to the implementation of social policies, both within national states and on the regional level, therefore, could be identified in terms of these questions:

1. Is equality the accepted core value of social policies and is its attainment widely recognized as a social goal, thus going beyond the basic objectives of national development which generally aim at an overall uplifting of living standards?
2. Is integration gradually but inevitably substituting for cooperation in South-east Asia and is the coherent implementation of social policies, nationally and regionally, both a consequence of and a condition for further integration?

On the first policy issue, if the implementation of social policies is aimed at enhancing equality (not only to strengthen

social cohesion), then that particular value would need to be explicitly expressed as a social goal. How does the notion of equality evolve into a social policy, that is aimed at setting standards and formulating regulations in specific areas of activities that are equally applicable to all citizens, primarily within a particular state but also between all the states in the area? The most practical intellectual process of establishing a consensus on its formulation is to validate it as a principle of right, in this respect as a social right. Implementing social policies, then, would seem to be a matter of searching for the strategies of change that would allow for a continuing improved fit between aspects of equality, social rights and policy results. In a more generalized formula, the relationship among what could be considered as main aspects of a social policy, could be restated as creating ever better correspondence and integration between values, principles and policy outcomes. Although inseparable from the other aspects, the most crucial dimension of a social policy is by far its actual outcome, gauged in terms of criteria of both effectiveness and efficiency.

Social policies tend to be seen as being in basic conflict with economic policies. This should, however, not necessarily be so. Social consensus that builds up wide public support for a vision of an ideal future that is laid upon some basic minimum rights, can be an essential element of economic efficiency, sustained growth and, thus, job creation. Social rights are not less important than property rights. A social policy is to be judged relevant to the extent that, apart from being intrinsically desirable, it is also economically

market-enhancing. What, then, are those social rights and how is political legitimacy brought about in their support?

Social Protection, Social Charter, etc.

An initial inventory of a number of minimum rights for consideration as part of a social agenda process in Southeast Asia, could relate to the general notion of social protection for those in the world of work. These could include:

1. equitable wages sufficient for a decent living;
2. rights for part-time and temporary workers nationally and regionally;
3. freedom of association and collective bargaining;
4. the right to vocational training and recognition of educational qualifications;
5. equal treatment for men and women;
6. satisfactory health and safety at work;
7. protection of children and adolescents at work and overseas workers;
8. proper retirement pensions;
9. freedom of movement of workers across the region;
10. improved living and working conditions throughout the region.

How are these limited number of listed rights, in turn socialized? In the national area, social rights may be incorporated within various laws that regulate the economy or legislated separately. On the regional level, however, rights are primarily declared, unless states in the area bind themselves in a treaty, or, ratify the relevant United Nations conventions. The formulation of a regional convention or social charter could be a practical way of

establishing, not a set of legal prescriptions to be applied homogeneously across the diverse region, but a "solemn statement" as a foundation upon which national regulation could be constructed. The dynamics of standard setting would seem to be quite straightforward. Articulating social rights within a national context is a process that develops gradually. Which particular rights are strived for at a given moment depends on historical circumstances. Not all social rights are struggled for at one time. Some have already become legal norms, a number of others are still being morally aspired to. However, it is essential to understand that social rights become rights by the very fact that they are being fought for.

As the initial processes of formulating rights norms take place within a state, guaranteeing social rights has evolved into a particular responsibility of states. The conventional view prevail that, resulting from spill-over effects of vigorous economic growth, the claims that these social rights make will in time be met. However, what animates the actual striving on the part of a public constituency to generate sustained efforts to promote and protect those rights, is what is a more relevant question. For, while a whole normative system may be in place, it is the logic of social dynamics that galvanizes initiatives to activate for the adoption and realization of those rights.

Uneven Growth, Competition, etc.

The adoption of a social agenda can be motivated by considerations other than or

additional to those which are sourced in moral aspirations or egalitarian ideals. The phenomenon of uneven growth, which is the inevitable consequence of the workings of a market economic system, brings out the need for social levelling actions to secure a perception of rational order, or, social justice. To maintain consistent rates of growth of the economy, the importance of shaping a social consensus must be seen to be on a par with the institutionalization of market competition.

Social welfare provisions that could lead to high labour costs and reduced competitiveness need to be balanced out against the adverse effects of disruptive industrial actions and alienation of a discontented labour force. Within the Southeast Asian situation, specifically ASEAN as indicated by institutional statistics, the rising challenge is cheap labour from the rest of Asia (but also from the new ASEAN members) in the competition of labour-intensive manufactures and graduation to higher value-added production. The single course of response to this challenge is to upgrade the quality and productivity of labour, especially skill formation, which because of its urgency becomes political. Social policy that addresses technical issues as social rights and conversely, can contribute to economic efficiency. The problem, then, would seem to be, more specifically, what could be a "productive social policy"? Inevitably, however, in the processes of integrating values, i.e. negotiations, which is what social policies are all about, economic calculus will intersect with aspirations, interests and demands, thus, democratically shaping the politics of labour.

Harmonisation, Mutual Recognition, etc.

As regards the second policy issue, that of integration as distinguished from co-operation, if Southeast Asian or ASEAN regionalism gradually takes on an inevitably integrative character how are co-operative -- but non-integrative -- modes of interaction to evolve? An initial matter to be taken account of is the nature of integration problems which, as mentioned above, are basically political. Decisions concerning the specific role of states and non-state actors, priorities of expenditures etc. are clearly political. How is ASEAN political cooperation to be defined under conditions of advancing integration and what are its acceptable outer boundaries? The thrust of past ASEAN political cooperation may not have been entirely resolving problems but containing fall-outs. This mode may have been adequate to deal with matters within a context of a "geographic" regionalism (a regionalism composed of nationalisms), but less so in a new "global" regionalism (a regionalism that interweaves economic development, globalization and political change, thus by passing but not superseding nationalisms).

Integration is happening on all levels as a result of flows of natural resources, manufactured goods, investment, concepts and ideas, building linkages between economic and social structures, therefore also between political systems. While these trends may have been perceived to lead to closer cooperation, the dynamics of uneven development create conflicts between interest groups, which is a natural state of affairs. However, resolution of disputes pres-

ent alternatives between two basic modes, "harmonisation", which is integrative, and "mutual recognition" which is non-integrative. The former interfaces internal and cross-border uneven development; the latter stops at formal national boundaries of fragmented responsibilities.

Positive Integration, Regional Policies, etc.: Beyond Social Policies

It may be premature to state that regionalism will supplant nationalism, but a new balance requires to be conceptualized and constructed. In any case, it would seem that, even without political union being an ultimate objective, integration does follow regionalism. The question remains, to what extent is the idea of a social agenda recognized as being deeply inter-related with integration processes. If integration creates the need for social policies, how far does a social agenda become a necessity for further integration? Past political co-operation may have been overlaid with aspects of integration, but it was more in the sense of "negative" integration of eliminating barriers rather than "positive" integration of promoting regional policies. If

that is the case, then the shaping of a social agenda would then be an intermediate phase towards the institution of integrated regional development policies. For all that this may have been unintended, this would be a new vision of Southeast Asia.

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ASEAN's Future*

Jusuf Wanandi

Introduction

IN the first 30 years of its existence, ASEAN has been primarily a state to state relationship. It is such a relationship par excellence, but is basically confined to state to state relations. This was indeed the main objective of the founding fathers given the state of affairs in the region then. Over the years NGOs in ASEAN have also developed an increasingly intensive web of relations between themselves. These relationships have resulted in the creation of what are known as Track Two and Track Three groups and activities. However, their relations with the Track One, namely the inter-governmental activities, remain much underdeveloped. To a certain extent this has created a dichotomy in ASEAN cooperation.

Recent developments and challenges in the region, such as the haze problem caused by Indonesia but which affected nearly all of Southeast Asia as well as the currency

and economic crisis, have posed new challenges for the future of ASEAN. Whether or not ASEAN could do something real in the short term to resolve these problems together, will have a significant influence on ASEAN's long-term developments. In this regard, ASEAN may have to develop new institutions. However, of greater importance will be the degree of commonality in the members objectives and principles, the extent to which ASEAN's "constructive involvement" with each other in domestic developments is accepted, as well as the intensity of the involvement of ASEAN's Track Two and Track Three in ASEAN cooperation.

Cambodia's membership in ASEAN, for instance, has created divisions among ASEAN governments on how to handle this particular problem. The issue is whether to accept the fait accompli, which means to ignore Hun Sen's coup d'état in early July 1997, or to put pre-conditions in the form of a fair and democratic elections in July 1998 with the full participation of Prince Ranariddh and his party. The division relates to the acceptance of the principle of "constructive involvement" in each other's internal developments.

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ASEAN's Achievements And New Challenges

There is no doubt that ASEAN's cooperation in the last 30 years has achieved the prime objective of its founding fathers as set out in 1967, namely to create a peaceful and dynamic Southeast Asia, based on solid and healthy state to state relations. They rightly believed that this will help the member countries to pursue their national development, and in turn will create a more cohesive and cooperative Southeast Asia. There is no doubt that what they had in mind was the creation of a one Southeast Asia, because only then could the region be resilient and strong enough to face the pressures from the great powers in the future.

The founding fathers did not contemplate the idea of integrating the ASEAN states or societies. The most far reaching idea ever proposed on the Indonesian side was the creation of a confederation of states in which some tasks of the states, such as foreign affairs and defense, could be given to the confederation. It was only at the first ASEAN Summit in 1976 that economic cooperation began to receive attention. Only 16 years thereafter, namely at the fourth ASEAN Summit in Singapore in 1992, did ASEAN agree to strengthen and accelerate the process of economic integration through the AFTA (ASEAN Free Trade Area) program.

Meanwhile, ASEAN continues mainly as a bureaucratic structure of cooperation, involving mostly diplomats from the foreign ministries of member countries. As has been said earlier, NGOs in ASEAN have developed more intensive relations amongst them, but without much cooperation or recognition from the ASEAN governments. In fact, in some cases such as on human rights, East

Timor and the environment, those NGOs groups concerned have been opposed to government policies.

ASEAN today is faced with new real challenges that it has to respond to. This might involve changes in the nature of ASEAN cooperation and its identity in the future. It is also possible that ASEAN will go on as before without responding to those new challenges, thus risking the likelihood of becoming irrelevant for the region in the future.

There are four main challenges faced by ASEAN that could have a significant impact on the future. First and foremost is the economic crisis, which began with a currency crisis, but has become a severe financial and economic crisis and in the case of Indonesia has become a complicated domestic political issue. Although some aspects of the crisis are national in nature, there are some that definitely have a regional dimension. However, until now there has been only feeble efforts to do something about the regional aspects of the crisis. There was the Manila plan to establish a kind of fund to complement the IMF and a regional surveillance mechanism for early warning. These have been further discussed in a Kuala Lumpur meeting but without concrete results. Little attention was given on the crisis at the APEC Summit in Vancouver. There was another small effort at the ASEAN Summit with the other three Asian Leaders in Kuala Lumpur in December 1997 as well as meetings of Central Banks and Ministers of Finance of ASEAN. However, they are meant for more consultations rather than for developing concrete measures to overcome the contagion effect or for suggesting steps to be taken by any of the member countries

facing a crisis with the assistance of the others.

Assistance from other ASEAN countries was offered to Indonesia to help overcome the crisis, but this was a bilateral effort or under IMF leadership. The real reason why ASEAN's cooperation is lacking is because ASEAN is not a regional cooperation that is being prepared for such a crisis, especially in relations to the crisis in Indonesia where politics are playing a heavy role in the crisis. There is no precedence for ASEAN members to get involved in each other domestic policies, including in macro-economic policies, and there are no mechanisms for coordinating macro-economic policies in ASEAN. The meeting of Ministers of Finance and Central Bank Governors are only consultative in nature and do not even take place regularly.

Another challenge is the haze problem in Southeast Asia caused by the forest fires in Kalimantan and Sumatra. Again here, ASEAN has been caught by surprise and cannot do very much about, because it is not prepared to induce Indonesia to do more to prevent such fires from breaking out. Even after such a calamity has happened, there was still the tendency to say nothing urgent and critical to Indonesia. It appears that especially where Indonesia is concerned all other ASEAN governments are very cautious, because of Indonesia's critical position and leadership in ASEAN. The principle of non-interference has been taken to the maximum although the haze is a real calamity for other ASEAN countries, especially Malaysia and Singapore. And now that the fires have started again in Kalimantan and Sumatra, earlier than everybody thought could happen, ASEAN has to learn

to adjust to the new challenges among themselves and find new ways and even formulate new principles of cooperation if ASEAN is to survive in the future.

The third challenge is the enlargement of ASEAN. ASEAN has already accepted Myanmar and Laos, while Cambodia's membership has been postponed due to the coup d'état by Hun Sen against Prince Ranariddh, his co-prime minister and rival. There are two problems posed to ASEAN due to its enlargement. One is among ASEAN itself and the other one is in the relationship between ASEAN and its Dialogue Partners, especially the Western countries. On the ASEAN side, there are again two problems. One is the impact of the enlargement on the process of decision-making and the principles of ASEAN in the future. Decision-making has become more complicated, while the principles of ASEAN will become more diffused due to the inclusion of the new members. This means that in ASEAN's decision making in the future, consensus should only be maintained on matters of principles, while on other matters the overwhelming majority should be adequate to decide.

On principle matters, despite ASEAN's adherence to unwritten ones, which has become a convention since its inception, a certain number of principles should be written. This is not only possible now but will be vital for ASEAN because the new members had not been present when those principles were accepted and thus might reject them in the future. Also, it would be of critical importance to ASEAN to accept new principles to be able to respond to the new challenges in a more basic way.

The second problem for ASEAN cooperation due to enlargement is the need for the

more developed members of ASEAN to assist the new members, especially in advising on macro-economic policies and investment, as well in human resource development. The older members also need to assist the new members in getting financial assistance from the developed nations. Without such assistance a two-tier ASEAN is going to develop that could be divisive for ASEAN co-operation.

The other challenge here is to help the new members move in their political and economic development and in doing so, to get the acceptance of the Dialogue Partners to include them in all dialogues and cooperation activities. Myanmar is one of the new members, where this type of assistance is critical, because it will never get off the ground without substantial financial aid from the developed nations. Otherwise she will face another economic and political crises like a decade ago in the near future. In this context, "constructive involvement" in the policies of new members by the older members is vital for the former and ASEAN as a whole.

In relation to Cambodia, it is obvious that the full participation of Prince Ranaridh and others of his party as well all the people in the border with Thailand, in the general elections in July 1998, is vital to the credibility of the elections. A solid participation of international and ASEAN observers for oversight is another pre-requisite for a basic fair and democratic general elections, which should be a very important condition *sine qua non* for Cambodia's participation in ASEAN. In all these efforts, ASEAN's Troika and its Dialogue Partners (in a group of the so-called "Friends of Cambodia") has a vital role to prepare Cambodia to become

a new member of ASEAN and of the international community.

The fourth challenge is to sustain ASEAN's external relations, especially ASEAN's initiatives and its role in APEC (Asia Pacific Economic Cooperation), ARF (ASEAN Regional Forum), and ASEM (Asia Europe Meeting). To be able to sustain those initiatives and make it a success, in which ASEAN contributions could really make a difference, ASEAN has to give more attention and resources to its participation. In some instances, such as in ARF, ASEAN should establish a more permanent institution to cope with its future development.

In relation to its involvement in APEC and ASEM, ASEAN should establish a special unit in order to be able to develop a common stand and policies in facing the bigger regional organization. In doing so ASEAN can have a real leading role to play as expected. Now is the opportunity and the time for ASEAN to contribute and have a real impact on regional developments in the Asia Pacific and between Asia and Europe.

If in the next two to three years ASEAN can not get its act together, the opportunity will be gone and others will take over ASEAN's role. This is, of course, a very critical period in ASEAN members' development due to the economic crisis, and therefore something has to be done to prevent a diversion of ASEAN attention away from its regional role in the ARF, APEC and ASEM. Otherwise, ASEAN's role will diminish rapidly in the next few years. This means that despite the economic crisis, ASEAN leaders must have the political will to provide human and financial resources for ASEAN's participation in those important regional institutions. Of course, ASEAN

also faces other new challenges such as the problem of labor, migrations, transnational crime and drug-trafficking. However here it suffices to recognize them and to think about ASEAN responses in general.

In summary, these new challenges mean three things for ASEAN. *First*, is the acceptance of new objectives and new principles to achieve those new objectives. Suffice it to say here that the most important new objective is ASEAN's greater integration in the future and that ASEAN has to develop beyond state to state relations. In practice integration has been going on for some time and some integration has already happened as has been shown by the currency crisis and its immediate contagion among ASEAN members. How much integration is to be achieved will have to be left to the process.

Exchanges on the direction and speed of regional integration could first be undertaken at the "second track" level before it can be discussed in the first. Very sensitive domestic issues should be left out until every member is ready to accept it, except in cases where the regional impact is obvious.

Second, is the institutional response. ASEAN has been proud to be able to do things without having strong institutions. That may be valid for the first 30 years when state to state relations alone sufficed. But if regional integration becomes an important development for ASEAN, which it should be if ASEAN wants to maintain its relevance in the future, then greater institutionalization is a must. This means that more resources, human and financial, should be given to ASEAN. ASEAN may still avert of becoming a Brussels type of bureaucracy, but there is a long way to go from

transforming the ASEAN Secretariat as it is now into a Brussels type one in the future. Something in between these two types appears to be advisable. Also, the external role of ASEAN in the Asia Pacific as well as in relations to Europe, will need some greater institutionalization.

Third, is the need for NGOs to participate more fully in ASEAN's activities and to create a nexus with the governments through the idea of an annual ASEAN Congress in which both sides can explain their ideas and programs and can explore ways to promote cooperation.

It needs to be reiterated that these challenges and responses are critical for ASEAN's future, although the timing to discuss, debate and accept as well as implement them may not be opportune now because all attention is being directed to the economic crisis. But at the same time, if ASEAN is unable to respond to these challenges ASEAN will have a real problem in the future.

ASEAN's Longer Term Developments

Depending on whether ASEAN can and will answer as well as respond to the new challenges or not in the near future, there are two possible models of ASEAN in the longer term plus a hybrid of the two. The first model of a future ASEAN is more or less the same as ASEAN today but with some small adjustments and changes. This ASEAN is mainly a regional cooperation based on state to state relations, where member countries maintain sovereignty over their main developments and future. The governments and bureaucracies are the mainstay

of the organization although the primacy of the Foreign Ministry will be diluted, because economic ministries will become more influential as they play an active role in overcoming the economic crisis and will stay involved afterwards.

Track Two and Track Three activities are mostly confined to themselves and a certain dichotomy could be discerned between the first track and the second/third tracks. Tensions among ASEAN members could increase because there will be less efforts to solve regional problems such as the economic crisis and the haze. A two-tier ASEAN based on levels of economic development could develop and create divisions among the old and new ASEAN members. This could happen if there is no willingness on the part of the old members to assist, and if on the other hand the new members do not want to accept a certain level of "constructive involvement" in return. Due to this tension, and because of the economic crisis, ASEAN's decision making process will become more difficult and no clear policies can be achieved in the future. In the meantime institutions that are a pre-requisite for further cooperation are not being created and resources are not forthcoming. These will be the main causes for the decline in ASEAN's influence and its pioneering status in the region, such as in the ARF, APEC and ASEM.

The economic crisis is partly responsible for this, as it will be the focus of attention of the member economies for the next few years during which it will be critical to move forward with regional institution building. ASEAN cooperation will be put in a back burner due to the unwillingness of its members especially the new ones to accept the

"constructive involvement" of other members. This will also be the case with other members who really have to face domestic instabilities due to economic crisis and long stalled political developments.

In short, this ASEAN model can survive, but will be less relevant to its members and the region, and in the worst case scenario could not be relevant to overcome the divides and deep differences among the members in dealing with national and regional challenges. These tensions and differences could result in an unstable Southeast Asia again in the longer term.

The second model of ASEAN's future development will depend on whether ASEAN can overcome and respond to the existing and future challenges and above all on whether they have the political will or not to become more integrated and to develop a community in the longer term that would be able to cope with future challenges from a position of strength.

This means, *first*, to set up a more ambitious objective for ASEAN's future than only a regional association based on state to state relations. This implies a longer term objective of establishing a community of Southeast Asian nations and societies. The degree and speed of integration should not be pre-determined but should be pursued on the basis of a step by step approach, but the ultimate goal should be made clear.

ASEAN should be able to formulate the basic principles that will guide ASEAN in achieving its goal and objective. These principles should encompass cooperation in all fields: economic, political, social and cultural. They should incorporate the principles of existing members such as Indone-

sia's Pancasila, Malaysia's Rukun Negara, and the preamble of the Philippines' constitution. One most important principle in establishing an ASEAN Community is to be able to get "constructively involved" with other members' domestic developments which have an immediate regional impact. This should be done in an "Asian way" (informal, non-confrontational) and could even start at the second track level, namely by ASEAN-ISIS, who has some experiences already.

Institutionalization is another prerequisite for a stronger ASEAN in the future. This should include greater authority for the ASEAN Secretariat General and therefore the ASEAN Secretariat should be also an institution to support on a regular basis the ASEAN Senior Officials, in making and implementing their political and security decisions. The Secretariat should also include representatives from the defense establishment, because it will look after ASEAN's political-security cooperation as well as act as the support institution for the ARF.

Another institution is to be created to facilitate some coordination of macro-economic policies, and monetary as well as fiscal cooperation that is being promoted by the Ministers of Finance and Central Banks Governors. This cooperation could start with efforts to increase transparencies and exchanges of credible information among the members. In this context the participation of ASEAN Planning Agencies might also be needed.

Finally, ASEAN NGOs should be encouraged to work together and to develop more intensive relations with ASEAN governments, because there is the danger that they go on separate ways, creating a dichotomy in ASEAN that will be detrimental

to ASEAN's desire to establish a community in the longer future. For now, the ASEAN Congress, initiated by ASEAN ISIS is the best vehicle until something more institutionalized could be established in the future. The ASEAN Congress is a meeting involving representatives of the first, second, and third track from all ASEAN members.

Concluding Remarks

The main question with the second model of ASEAN's future is whether the governments could see the strategy clearly and could perceive the challenges faced by ASEAN realistically. Most probably they are not that far-sighted or bold enough and will opt for an easy way out and will give in to compromises in the ASEAN style. Thus, what can be expected is probably some incremental changes which is more than maintaining the status quo but less than the second more imaginative and creative model of ASEAN's future. It is difficult to expect that the older generation leadership as well as governments of new members in ASEAN would be ready to embark on this second model. A modified first model, which involve incremental and some fundamental changes in some aspects could be seen as the third model and is the more likely direction that ASEAN will take.

Discussions on the second track could make the options and each of the consequences more explicit. It could be expected that after vigorous debate there will some recognition by the governments of ASEAN's real challenges for the longer term future. Hopefully, this will be followed by the necessary decisions by the ASEAN governments who are still very much in charge of ASEAN's future development.

Myanmar in ASEAN: Challenges and Prospects

Aderemi Isola Ajibewa

Introduction

RECENT events in Cambodia and the admission of Laos and Myanmar have compelled a re-examination of the challenges to be faced by Association of Southeast Asian Nations (hereafter referred to as ASEAN) in the new millennium. Moreover, the 1996 addition of Myanmar and India to the ASEAN Regional Forum (ARF) broadens the area of possible security concerns. It seems that a viable regional security system must rest on the acceptance by Southeast Asian states of "rules" which relate their domestic political structures to their relations with one another. It must be recalled that both the scope of the tragedy which Cambodia has been engulfed in, and its regional dimension have led the ASEAN Standing Committee to mediate by sending its three-man delegation to help find a solution to the Cambodia political crisis. The essential point is that the crisis in Cambodia involved competing groups within the country, and thus had an impact on regional security.¹ For as rightly pointed out by the

Singapore Foreign Minister Prof. S. Jayakumar, "Any unconstitutional change of government is cause for concern. When force is used for any unconstitutional purpose; ASEAN cannot ignore or condone that".² The mass movement of refugees from Cambodia to the neighbouring countries contributed a lot to the regionalisation of the crisis. With the breakdown of law and order, the total collapse of discipline among the soldiers two factions, the increasing level of social and economic hardship, and escalating insecurity of life and property, thousands of people began to move out of Cambodia. *First*, foreign citizens left, and gradually, the movement fever caught the citizens of Cambodia.

In an increasingly interdependent world where the concept of absolute sovereignty

legation in Beijing, the First Prime Minister, Prince Norodom Ranariddh who was met at Bangkok, Second Prime Minister Hun Sen, who initially turned down the delegation but later wrote a letter of invitation and Foreign Minister Ung Huot.

²See *New Strait Times*, July 25, 1997. The ASEAN three-man delegation sent to Cambodia were Foreign Ministers of Indonesia, Ali Alatas, Phillipine's Domingo L. Saizon and Thailand's Prachuab Chaiyasarn.

¹The major parties in the conflict were King Norodom Sihanouk who was met by the ASEAN de-

is largely meaningless, inter-state cooperation, whether at the sub-regional, regional, or international level, is essential, possible and desirable. This is necessary in South-east Asia where the "old" and "new" ASEAN members will use such co-operation as a more realistic and appropriate approach to dealing effectively with their common problems. This is against the background that the regional actors are likely to be more familiar with the complexity of the issues which the region presents. The question being asked then, is whether ASEAN has the ability to evolve clear concepts and strategies through their own regional mechanisms for the effective management of these challenges.

Relations between the poorer members of ASEAN such as Laos and Burma, etc., and the better-off members such as Malaysia or Singapore contain many potential sources of conflict. In this regard, this paper will, of necessity, address the problem of the relationship between internal action and the dynamics of a civil society in the context of ASEAN those dynamics are particularly acute with the transformation of ASEAN from a membership of seven to nine. It raises important questions with respect to the organisation's internal dynamics as well as its ability to foster a truly stable and peaceful Southeast Asia. It remains to be seen whether ASEAN cohesion, consensus and solidarity can be maintained, or perhaps other organisational modes will have to be found that can accommodate the command political system of two socialist states (Vietnam and Laos), a still disintegrated Cambodia, and a Myanmar junta to the liberal West. Although they were interlinked by political and eco-

nomic similarities with one another, it is, however, obvious that the ASEAN Five were already diverse in terms of political systems, economic levels and strategic outlooks. ASEAN Nine will be even more diversified because its new members sharpen the economic and social disparities and accentuates the problems of group policy uniformity and harmonisation. For as pointed out at the last ASEAN Regional Forum by the ASEAN Standing Committee Chairman, Datuk Seri Abdullah Ahmad Badawi, that "globalisation and larger regionalisms would threaten to obscure Asean's identification and existence".³

Myanmar in ASEAN and its implication for the wider region: Advantages and Challenges

Since conflict is primarily a regional phenomenon, and our overall concern is with regional security, it is necessary to examine what a region is. A region may be defined as "a set of contiguous states with a level of interaction between them, such that a lack of security within or between individual states in the region affects the security of the set of states as a whole".⁴

Malaysia for example, has obvious common interests, and somewhat similar problems to face as, Indonesia or Thailand which she does not have as compared with Peru or Argentina. Moreover, since conflicts having foremost a bilateral and local relevance can escalate to regional level, settle-

³*New Strait Times*, July 22, 1997.

⁴Barry Buzan, *People, States and Fear: An Agenda for International Security Studies in the Post-cold War Era* (London: Harvester Publ., 1991), 188.

ment of such conflicts is foremost a question of state to state relations. Thus, regional defence agreements or pacts are concomitant to regionalism as they are aimed at protecting the expected gains of their mutual co-operation and interests from being undermined militarily or through other indirect subtle means.

Regionalism as it applies to our study may be defined as attempts by contiguous nation-states, reinforced by a sense of common purpose or predicament within a definite region or defined area, to foster economic or political co-operation among themselves in order to lessen their dependence on others outside the region.

It can be deduced from the above definitions that regional groupings are a continuum of three stages -- co-operation, co-ordination and full integration with an ulterior motive in accommodating local conflicts. Economic integration, according to the functionalist model, contains in it a certain dynamic logic that by bargaining collectively fulfils the background functions of a pluralist political structure, similarities in economic and industrial development and ideological political structure with its inherent spill over.⁵ Spill over im-

plies that success in one integration sector will then lead to advances across a much broader front just as the economic achievements of the European Community have since then generated additional political co-operation.

At the regional or continental level, attempts at fostering a strong political and security in the region have been exemplified with a series of treaties from the Bangkok to the 1971 Zone of Peace, Freedom and Neutrality (ZOPFAN), and the ASEAN Regional Forum (ARF) 1995.⁶

Moreover, there exist certain ethnocultural and economic similarities within each region which are far more remarkable than the differences. These are enhanced by cross-border trading and free movement of people which in Southeast Asia pre-date ASEAN. This does not preclude the members of the organisation having areas of conflicts -- for example over the artificial borders inherited from the colonial powers, and the rivalry over the relative weight and influence of member states.

As has been discussed in the earlier sections, it appears that the basic notion of insecurity in many Southeast Asian states stemmed from the leadership belief system that perceives other nations as the enduring source of threat to its security. However, because of the wide range of threat possibilities,⁷ the perceptual problem be-

⁵Works in this direction include, Ralph Onwuka and A. Sesay (eds), *The Future of Regionalism* (London: Macmillan, 1980), David Mitrany, *A Working Peace System* (Chicago: Quadrage Books, 1966), W.H. Riker, *The Political Theory of Coalition* (New Haven: New York Press, 1962). Others are Carol Lancaster, "The Lagos Three: Economic Regionalism in Sub-Saharan Africa", in John Harbeson and Donald Rothchild (eds.), *Africa in World Politics* (Boulder: Westview, 1991) 249-267 and J. Ravenhill, "Regional Integration and Development in Africa: Lessons from the EAC", *Journal of Commonwealth and Comparative Politics* 17/3 (1979).

⁶For more details on ZOPFAN as a comprehensive regional security idea, see B.A. Hamzah, *Southeast Asia and Regional Peace* (Malaysia: ISIS, 1992).

⁷See Aderemi Ajibewa, "Nigeria Threat Analysis". Manuscript submitted to *Nigeria Forum*, and G. Boyd (ed.), *Regionalism and Global Security*

comes fundamental as it affects the entire formation base on which the decision making process rests, making solutions a long lasting dilemma. Having said this, in practice, it seems clear that solutions to insecurity and instability in the world and in Southeast Asia would still be woven around the three concentric circles of national, regional and global methods. It is clear that the three should comprehensively be interlinked for an effective resolution to conflict.

In welcoming and defending the move by ASEAN to incorporate Myanmar in the ASEAN fold, Philippine President Fidel Ramos, in a joint news conference with Singapore Prime Minister Goh Chok Tong, said that, "We look at ASEAN as a family where you have strong, capable, economically affluent and at the same time, some poor and weak members who must be kept together within the family". While, according to Ali Alatas, Indonesia Foreign Minister, though ASEAN realises that Myanmar is under heavy condemnation over its human rights violation, embracing Myanmar into ASEAN fold is an appropriate step.⁸

Given these perception and the views by ASEAN's leaders on the Myanmar issue, it is probably not surprising if we see a creation of ASEAN Ten by the year 2000. As Michael Vatikiotis once predicted, full membership of ASEAN to all Southeast Asia states will happen in the first decade of

the year 2000.⁹ These proclamations by ASEAN's leaders have directly provided us with some background on the reason behind ASEAN's decision to include Myanmar.

Advantages For An Expanded ASEAN

The decision to admit Myanmar and Laos into ASEAN, to an extension of earlier steps which has seen the admission of Brunei and Vietnam into ASEAN in 1984 and 1995 respectively. From five members in 1967 to six in 1984, the 90's therefore marked a dramatic and significant period for ASEAN. This period witnessed an expansion of ASEAN membership to almost all the Southeast Asia states through the fulfilment of the founding fathers vision.¹⁰ It must, however, be mentioned that this expansion was made possible through the dissipation of the Cold War systemic impediments. Therefore, the One Southeast Asia concept reflecting the vision of the founding fathers for a single community reflecting a region with unity, diversity of views respected and indeed serves as its strength.¹¹

Under the concept of a wider region, it enables ASEAN to address the problems

(Lexington: Lexington Press, 1984) and Leslie H. Brown, "Regional Collaboration Resolving Third World Conflicts", *Survival* (May-June, 1986), 210-211.

⁸Simon J. Hay, 1996: 259.

⁹Uniting Southeast Asia: Reality or Chimeria?", 1996: 331.

¹⁰Three months after ASEAN's formation, Malaysian Tun Abdul Razak expressed his hope that the non-ASEAN members in Southeast Asia region, would join ASEAN in near future to achieve a glorious era of development and modernity, see Chin Kin Wah, 1997: 7.

¹¹See H.E. Chuan, in his opening statement given at the forum on "Towards One Southeast Asia in the 21st Century" held on 22 February 1993 in Bangkok, Thailand.

faced. In Myanmar for instance, the political instability creates a refugee problem for its neighbouring states. However, with Myanmar in ASEAN, it is envisaged that all can work together to formulate effective mechanism in dealing with the problems. Through "constructive engagement", ASEAN might be able to influence the Myanmar government to follow the ASEAN way in a more acceptable manner in the eyes of the Myanmar citizen and international community. The concept of One Southeast Asia emphasises the importance and need for shared identities, interests and values and, it is a hope that all ASEAN members will be able to apply and practice this principle especially on matters that concern the common interest.

Another reason for the expansion of ASEAN is also to avoid Southeast Asia being divided into two -- politically and economically diverse arrangements. In this connection, it brings about a united Southeast Asian states able to speak with a single voice and protect the pivotal position of ASEAN as well as its corporate interests.¹² This is to avoid disputes in the region developing the hallmark of a colonial hangover. Presumably, the need to reduce extra-regional influence in the sub-region as a whole, and an attempt to bridge the colonial anglophile/lusophone misunderstanding influenced decision-making in preventing a repetition of what Leopold Sedar Senghor characterised as the "Spirit of Fashoda" in Southeast Asia. It could be seen prior to the admission of Vietnam that

the cleavages remained and, though often subdued, appeared from time to time to complicate the process of intra-community relations. The admission of Vietnam, Myanmar etc is seen as providing a motivation to eradicate these old demons. It is understandable, therefore, that ASEAN's leaders pursued a policy of incorporating pariah states such as Myanmar.

Greater Regional Economic Development

Looking from past development, ASEAN's economic co-operation proceeded at a very slow pace. It was only in 1992 that an initiative in the name of economic co-operation among ASEAN members began. The Summit meeting in 1992 in Singapore witnessed the Asia Free Trade Association (AFTA) agreement by all ASEAN members.

By admitting Myanmar, opportunities to establish closer rapport between ASEAN members and Myanmar government can be enhanced. When these were accomplished, the realisation and achievement for full implementation of AFTA will become smoother. Myanmar in ASEAN will promote further economic development not only in Myanmar but also in the region. Myanmar is rich in mineral resources such as petroleum, lead, silver and tungsten. For instance, Singapore, Malaysia and Thailand are moving into high tech manufacturing, and snatching the economic opportunities in Myanmar by investing millions of dollar especially in building infrastructures. As the Myanmar regime seems to be practising a more open policy in trade and business, thus enhancing more economic development activities. With a region close to 500

¹²Michael Leifer, "International Dynamics of One Southeast Asia: Political and Security", 1996: 361.

million, the admission of Myanmar and probably Cambodia makes the future economic market promising, though it will be valued less than North America Free Trade (NAFTA), European Union (EU), Japan or China. At present, ASEAN has a combined Gross Domestic Product (GDP) in purchasing power parity terms valued at US\$1,617 billion.¹³

The prospect for such a promising economic advancement is also strengthened through the developmental proposal on the Mekong Basin. The admission of Myanmar as well as countries in Indo-China provides ASEAN ample reason and opportunity to be involved in the development of the Mekong Basin, also known as the Greater Mekong Sub-region (GMS). ASEAN leaders in the 1995 Summit, recognizing the potential of GMS, a region rich in resources coupled with the benefits for a joint development, encouraged members to participate in the project. As pointed out by the Minister, Banharn Silpa-Archa in the Asia-Europe Meeting (ASEM) that the involvement of not only the six riparian states of the Mekong river, but ASEAN, Japan, South Korea and Europe as well in such a project would help a solid foundation of goodwill and co-operation among participating countries.¹⁴ This ASEAN initiative lies upon the notion of building a more desirable interaction and the experi-

ence in the handling of co-operation among ASEAN members. This involvement would provide a platform for ASEAN's governments to grow more familiar with each other and more importantly to promote economic growth to the ASEAN "new" members who are comparatively poorer than the original ASEAN Six.

Deeper Regional Political and Security Co-operation

Underlying the political and security matters of this region is the desire to see a closer regional co-operation on political and economic fronts. Symbolically, one of the reasons why ASEAN accepted Myanmar is to prevent Yagoon becoming too dependent on Beijing. With the end of the cold war, the military withdrawal of US bases from Philippines and the disintegration of Soviet Union, the regional security lies much in the hand of China.¹⁵ Given China's presence in the region which is made possible through its close ties with Myanmar coupled with the former's assertiveness over Spratly Islands, the ASEAN leaders have to take a concerted effort to see to Myanmar's admission.

The China-Myanmar relationship became closer after the 1988 crackdown in Myanmar. China gave Myanmar its support with provision of essential military equipment estimated at US\$1.2 billion which dramatically boosted its political, economic and military.¹⁶ Leaving the international

¹³This was stated in the keynote address by the Minister of Foreign Affairs on "ASEAN-Shared Identities, Interest and Values" at the Southeast Asia Forum in Kuala Lumpur, 4 March 1996.

¹⁴Detail analysis on the ASEAN assessment is in Jakkrit Srivali "Asian Assessment and Future Work", presented on the 7th Southeast Asia Forum, published in *ASEAN-ISIS Monitor*.

¹⁵Michael Leifer, 1996: 359.

¹⁶See David I. Steinberg "Myanmar's Political Economy: Opportunities and Tensions", paper pre-

"pariah" Myanmar, a recipient of sizeable arms transfer from China is a daunting prospective. Therefore having Myanmar in the ASEAN fold imposes a greater ASEAN influence on Myanmar's domestic policy and keeping the resource -- rich nation out of the Chinese orbit.

In line with the constructive engagement adopted by ASEAN, it leaves the door open for a more concrete and productive engagement. In addition, it enables closer rapport between the Myanmar government and its fellow ASEAN allies for further collaboration on issues pertaining to common interests. Some of the outlined benefits of an expanded ASEAN if properly managed include:

- greater self-confidence;
- improved management of intra-regional conflict;
- increased bilateral and subregional co-operation;
- strengthening intra-regional transnational linkages;
- regional order.

Challenges for An Expanded ASEAN

Despite the potential benefits to be derived from Myanmar's inclusion, there are challenges and obstacles awaiting ASEAN. By embracing Myanmar into its fold, ASEAN placed itself in an awkward position. This is because in an attempt to strive for the integrated 10 to evolve as a respected regional grouping, ASEAN at the same

time exposes itself to international criticism. Already, ASEAN has received strong criticism from United States and the European Union. The US and EU's stand is understandable as they have isolated Myanmar over the failure of the military junta to recognise the result of the 1988 election. In addition, the victors were jailed. With Myanmar in ASEAN, the question arises as to what extent this inclusion might affect the ASEAN-US and ASEAN-EU relationship?

ASEAN and US Relationship: A Forecast

Criticism from the US government and its people against ASEAN stems from the fact that the organisation endorsed and approved the practices of the military junta. In fact, the recent and continuous declining value of the currency of Southeast Asia states and currency speculation, are perceived by some ASEAN leaders as the making of western powerful individuals in order to retaliate against ASEAN's decision on admitting Myanmar. However, the incorporation of Myanmar in ASEAN is a matter that the US and ASEAN have agreed to disagree. Quoting the US ambassador to Indonesia, J. Stapleton Jay, "... the important thing in our relationship with ASEAN is to ensure that if there is an impact of the entry of new members, it does not undercut the ability of the US and ASEAN to work co-operatively towards a common goal."¹⁷ A similar view was expressed by

sented at a conference entitled "Myanmar Towards the 21st Century: Dynamics of Continuity and Change", in Chiangrai Thailand, June 1-3, 1995.

¹⁷USIA' Foreign Press Centre June 12, 1977, where US envoy represented the US embassies of the then seven ASEAN members.

the US ambassador to Malaysia, Mr. John Mallot that "... It is almost unthinkable to say that the decision to admit Burma is going to have any sort of negative overall impact on our relationship with ASEAN whether it is ASEAN as an organisation or the individual countries".¹⁸

From the economic point of view, this is understandable and expected as ASEAN is presently the third largest trading partner of US after EU and Japan. As reassuring as these statements might look, to what extent is their commitment to the principle. ASEAN cannot be ignorant of the fact that the US can turn its attention to other regions which are more favourable to it. India and China are becoming new destinations for world wide investors and act as ASEAN's major competitors. As Singapore Minister Goh Chok Tong noted, "China and India have further liberalised their already big economies. Their integration with the international economy will increase competition for market shares of capital and foreign investments".¹⁹

ASEAN and EU Relationship: A Forecast

Mohammed Jawhar Hassan, the Director General of ISIS, Malaysia pointed out that the pressures that will be faced by ASEAN does not differ much with the issue of East Timor, where pressures from Portugal and the EU existed (MASSA, 1997: 26). The refusal of the British government

to grant visas to the Myanmar leaders in order to attend the last ASEM meeting held in Britain goes a long way to indicate the relationship.

Challenges for ASEAN Consensual Decision Making Process

With a wider region of interest, consensus agreement and decision making within ASEAN could prove to be even more difficult. Although within the expanded membership, emphasis is on the effort to establish a broader and deeper collaboration and co-operation but the pressure on the ASEAN consensus still persists and will probably become more intense. Due to the different socio-political system and economic background, there is likelihood for a growing diversity in interest and opinion among the bigger ASEAN members. Srivali expressed similar concerns on ASEAN solidarity. For an expanded ASEAN, the factors that will undermine its credibility or successfulness depend upon the ability of ASEAN members to put aside their political differences and economic interests in order to reach mutual understanding and decision.²⁰ In this connection, Srivali proposed a few alternatives to prevent potential disunity among ASEAN members. One way suggested is to forge closer bonds not only in the level of policy elite's but also at all levels of the public.²¹ That is the need to build and establish a common ASEAN identity and values.

¹⁸ *Ibid.*

¹⁹ Simon J. Hay, "Moreover, the signing of North America Free Trade Agreement (NAFTA) also divert US commitment to ASEAN", 1996: 268.

²⁰ Jakkrity Srivali, "Asean: Assessment and Future Works", 1996.

²¹ *Ibid.*, 3.

For as earlier admitted by the Malaysia Foreign Minister, Datuk Ahmad Badawi that the inclusion of Myanmar and Laos will pose difficulties to ASEAN particularly in the decision making process as ASEAN's agreements and decisions are based on the mutual consent and consensus among members.²² Since ASEAN cannot but accept these problems, it is therefore not surprising when the Singapore Prime Minister, Goh Chok Tong at his closing statement at the 1995 Bangkok Summit, reiterated that "we will have to increasingly rely on the principle of flexible consensus". Thus, it meant that issues which consensus are not reached, member countries are free to do as they please.²³ Basically, this "flexible response" is quite understandable based on the perspectives that different members have different priorities and interests, and may seek to emphasise, pursue and implement their own policy. However, if this policy is to be adopted, it would mean that ASEAN, which is already a loose and relaxed association might even become even more disintegrated, thus weakening the vision and aspirations of a politically and economically integrated one Southeast Asia.

Conclusion

Unity is crucial among members as external power disputes and internal border issues between Malaysia and Thailand and the territorial disputes over the Sipadan and Litigan are areas of tension in the region.

Beside, a more controversial and significant territorial dispute over Spratly and Paracel Islands, involving not only four members of ASEAN, namely Vietnam, Malaysia, Philippines and Brunei, but also China and Taiwan also served as a potential threat. The need for confidence building measures for dealing with these potential conflict cannot be over emphasised.

Economic development, to a greater extent, will lead to a greater regional resilience. The regional resilience concept is actually derived from the Indonesia concept of national resilience introduced in the early 1970's and was adopted by ASEAN in 1976 at its first summit in Bali.²⁴ Underlying this concept is the building up of national resilience of all regional states through economic development. National economic development and stability coupled with better regional co-operation and interdependence under a wider region, would help overcome internal problems, ease bilateral tensions and presumably reduce the prospect of external interference in the domestic disputes and regional affairs.²⁵

Thus, the expansion of ASEAN to include Cambodia, Laos and Myanmar is indeed vital as this helps the economic development of the new members in reducing the gap between the developed and less developed members. Moreover it provides a foundation for an extensive regional co-operation and an advancement for national resilience.

²² MASSA, 1997: 30.

²³ ASEAN-ISIS Monitor, 1996: 2.

²⁴ Indonesian Quarterly, 1996: 77.

²⁵ Simon J. Hay, 1996: 259.

Socio Economic and Political Bases of the Nahdlatul Ulama Elite

Kacung Marijan

Introduction

THIS paper aims to explore the socio economic and political bases which are assumed to be the sources of support and influence for the Nahdlatul Ulama (NU)¹ elite in society. The first main section deals with the socio economic bases, indicating the socio economic characteristics of the *kiais* (another name of the *Ulamas*) in general, especially with regard to the elderly *kiais*, as well as the young elites of NU -- especially twenty young elites in Jombang, East Java. The second section discusses the political affiliations of both the elderly *kiais* and of the young elites.

The Socio Economic Characteristics of *Kiais*

The *kiais* enjoy a particularly privileged position in society because of their ability in the knowledge and practice of

the teachings of Islam. This is also because, in the discourse in Islam, and in terms of knowledge relationships, *kiais* are inheritors of the Prophet Mohammad. Thus respect and adherence to the *kiais* is very important for Muslims as the *kiais* are able to continue to follow the teachings propagated by Prophet Mohammad. Their closeness with previous well-known *kiais*, in terms of blood or teacher-student relation, is another consideration of this acknowledgement. Finally, the *kiais* are usually wealthy persons in the village and can be regarded as landlords to whom the landless are economically dependent.² By and large, the *kiais* have accumulative religious and economic resources which enable them to become important figures in society.

Such a privileged position, however, has not been achieved easily. Before becoming a *kiai*, a candidate must study Islam devot-

¹Nahdlatul Ulama (Religious Scholar), is a traditional Islamic Organization which was founded in East Java in 1926. It commands the support of some 30 million Indonesian Muslims -- makes it as the largest Islamic organization in Indonesia --

and led by Abdurrahman Wahid, whose grandfather -- Hashim Ashiri -- was the founder of the organization. Under Wahid's leadership, NU has been guided in the direction of religious tolerance. Michael Leifer, *Dictionary of the Modern Politics of Southeast Asia* (London: Routledge, 1995).

²R. Mortimer, "Class, Social Cleavage and Indonesian Communism", *Indonesia*, no. 8 (1969): 18.

edly. Many of them have even felt that it is not enough to study from a single famous *kiai*. In the past, there was a tradition in the *pesantren* (traditional Muslim school) that it was better to study Islam from more than one famous *kiai* in a number of *pesantrens*. This tradition was not only found in Java but also in other parts, such as Madura. As Mansurnoor explains, "Looking at the Madura context, we see that in the past the *santris* (students of *pesantren*) travelled from one place to another to obtain instructions from particular *kiais* and to gain access to diverse experiences".³ These *santris* were called *santri kelana* (wandering student). The unstructured curriculum of the educational system in the *pesantren* stimulated *santris* to study from more than one *kiais*. Before the improvement of its educational system in the early decades of this century, the *pesantren* was strongly dependent on the figure of *kiai*. In spite of their ability in the general knowledge of Islam, most *kiais* focused their expertise on a particular area of Islam, for example, in *tauhid* (theology), *syari'ah* (Islamic law), and *tasawuf* (Sufism). Thus, in order to obtain the knowledge of Islam from the experts, *santris* favoured study from one *kiai* to another. In addition, becoming *santri kelana* was important for the future of the *santri* himself. This tradition enabled the *santri* to recognise, and keep a good relationship with, a number popular *kiais* which might be useful when he become a young *kiai* and established his own *pesantren*. In fact, the more the young *kiai* got the *restu* (blessing) of famous elderly *kiais*, the bet-

ter. In particular cases, the elderly *kiais* even send their *santris* to study with the young *kiais*.

A good example of the *santri kelana* was Kiai Hasyim Asy'ari. Before becoming a great *kiai*, he studied Islam from more than ten *kiais* and *pesantrens*. First of all he obtained a general knowledge of Islam from his father, Kiai Asy'ari. He was a smart student, which was indicated by the fact that, as a 13 year old boy, he had already helped his father teach other *santris*. However, he was not satisfied with learning only from his father. With the blessing of his father he decided to study from other *kiais*, a decision related to most *kiais*' belief that sending their children to other *pesantrens* is better than teaching the children themselves. Hasyim Asy'ari went to famous *pesantrens* in Java and Madura Island before going to Mecca, Saudi Arabia, to perform Hajj where he stayed for about seven years studying Islam. Mecca was the last destination of his study because, after that, he went back to Jombang to establish his own *pesantren* in Tebuireng.⁴

That parents of *kiais* were able to send their children to study in various *pesantrens*, even in the Middle East, indicates that most of them were (and still are) from wealthy family backgrounds. Their parents and the *kiais* themselves, could be categorised as landlords in their villages. Some *kiais* were also traders, particularly those from coastal areas of Java. In the last century, and in the early decades of this century, the Muslim traders were recognised as the middle-class, so that the position of a *kiai*

³I. Mansurnoor, *Islam: In an Indonesian World Ulama of Madura* (Yogyakarta: Gadjah Mada University Press, 1990), 243.

⁴C. Anam, *Pertumbuhan dan Perkembangan Nahdlatul Ulama* (Sala: Jatayu, 1985), 56-64.

trader was economically high. Indeed, the history of the spreading of Islam in Indonesia shows that this religion was brought in by traders from Arabia, Persia, India, and China,⁵ with many *kiais* in Java today still being related to the traders.

Nevertheless, people surrounding the *kiais* also contributed and still contribute to the increase, or at least the maintenance of the *kiais'* wealth. Indeed a young *kiai* who wants to build a new *pesantren* is usually financially supported by his family. However, people surrounding him also financially and materially support the establishment of the *pesantren*. There is a notion in Islam that materials to support the *pesantren*, such as land and money, are regarded as *wakaf*.⁶ From the perspective of *fiqh*, the *wakaf* is not allowed to be the private property of any responsible person in the *pesantren*, including the *kiai* and his family. This notion has been clearly defined when the *pesantren* established a foundation (*yayasan*) which, officially, is the guardian of the *pesantren*. Through the foundation, people can distinguish the property owned by the *kiais* and his family and that of the *pesantren*.

Nevertheless, ownership in practice is still vague when we look at the leader and members of the foundation which are composed of the *kiai* himself and his family. In addition, as Mansurnoor has found in Madura, many people who visited the *kiais* also

brought money and other materials with them. They donated the money and the materials for the *pesantrens* through the *kiais* after the *kiais* gave them advice on problems they face. That is why, villagers told Mansurnoor, "While we all seek money, money seeks the *kiais*".⁷

To meet the costs of his family needs, the *kiai* obtains them from his private land and the tuition of *santris*. Those *kiais* who do not have their own *pesantrens* get financial support from the *pesantren* they work in. Thus, the total size of land holdings and the number of *santris* taught contribute to the degree of wealth of each *kiai*. The more land and *santris* the *kiai* has, the wealthier and more famous the *kiai* become. At the community level, the land of the *kiai* is also very important since it is considered an economic resource for the landless. This is because the *kiai* does not cultivate the land by himself but the landless do so on the basis of an agreement that they receive a proportion of the products of the land. A number of *kiais* are also traders and businessmen. Despite his deep knowledge of Islam, and being also a flamboyant politician, *Kiai Wahab Chasbullah*, for example, was also active in business, as a Hajj agent and sugar and rice trader.⁸ In addition, when NU was active in politics and some *kiais* became politicians and members of parliament, they gained salaries and pensions from the government as well. During the era of NU's

⁵M. Ricklefs, *A History of Indonesia Since c. 1300*, second edition (London: MacMillan, 1993), 3.

⁶*Wakaf* is an endowment. It refers to the materials such as land which is given to the person or institutions for Islamic purposes. Muslims believe that they would get benefits (*pahala*) in the hereafter from their *wakaf* as long as the things which were given are still used for Islamic purposes.

⁷Mansurnoor, *Islam: In an Indonesian World Ulama of Madura*, 254.

⁸G. Fealy, "Wahab Chasbullah, Traditionalism and the Political Development of Nahdlatul Ulama", in G. Barton and G. Fealy (eds.), *Nahdlatul Ulama, Traditional Islam and Modernity in Indonesia* (Clayton: Monash Asia Institute, 1996), 16.

political activities, many *kiais* and NU members were also advantaged by the patronage system. The Department of Religious Affairs which was a long time under control of NU, for example, provided employment for the members of NU and particular projects such as Hajj and shipping to a number of *kiais*.⁹

Socio Economic Characteristics of the Young Elite

Viewing their background genealogically, the portrait of the young elite of NU is not very different from that of the *kiais* or the elderly elites of NU in general. Of the twenty subjects interviewed, seventeen are children of popular *kiais* in Jombang. The rest have close connections with the *pesantren*, though there is no direct family link with the *kiais*. One of them, educated in the *pesantren*, has now become the young *kiai* and is relatively influential in *Pesantren Tebuireng*. The others also studied in *pesantrens*. The parent of one was the richest person in Jombang in the 1960s and the former treasurer of NU Jombang branch.

Nevertheless, looking at their educational and economic backgrounds, the differences are obvious. Indeed, whilst all of the young elites gained Islamic education from the *pesantren*, only two of them were fully educated in the *pesantren* -- the rest spent their time of study more in the modern educational system, including the universities. Four of them finished post graduate programs at famous universities, whilst one is still in the process of doing so. Basically

they gained benefit from the changes of point of view of the elderly *kiais* about the modern educational system. In the colonial period, the *kiais* viewed the modern educational institutions as part of the colonial system and should therefore be avoided. A number of resistant *kiais*, even, regarded the colonial educational institutions as *haram* (prohibited), and so were the life styles of colonialists. This standpoint changed after independence as the sponsor of modern educational institutions was then the Indonesian government. On the basis of these terms, the *kiais* could accept them, and they even enrolled their children there.¹⁰ Since the early years of independence the government has realised that education is the most substantial instrument to improve the quality of human resources especially since most people were illiterate. As a consequence, the government has provided various educational institutions, from primary to tertiary schools. However, due to the lack of adequate financial resources to provide all educational needs, the government also invited and supported private institutions to establish schools. This policy results in a great number of private schools in Indonesia, greater than the state schools. For example, the total number of state universities in 1991 was only 44, whilst at the same time, the private universities numbered 914.¹¹ The number of state universities is small primarily because the government is only able to subsidise them in limited numbers.

¹⁰Also, the fact that religious study is compulsory in these schools convinced the *kiais* that they are not really secular schools.

¹¹S. Ranuwihardjo, "Equity, Quality, and Efficiency in Indonesia's Higher Education System", in H. Hill (ed.), *Indonesia Assessment 1991* (Canberra: Australian National University, 1991), 53.

⁹M. Bruinessen, "Indonesia's Ulama and Politics: Caught Between Legitimising the Status-Quo and Searching for Alternatives", *Prisma*, no. 49 (1990): 55.

In addition, in the early years of this century, the "modernist" group introduced a classical model of education with a definite curriculum. The reformists adopted the *madrasah* (a famous Islamic school in the Middle East, copied by a number of countries in North Africa and the South Asian System). The reformists modified this school to become *Sekolah Islam* (Islamic School) with a mixed curriculum involving Islam, science, and humanities. Deliar Noer has pointed out the reason for the establishment of the new system,

... a new system of education was introduced. Some of the Indonesian Muslims began to recognise the importance of organisation and initiated organised teaching themselves, with a more or less set curriculum. Learning by understanding rather than by rote was introduced.¹²

At the beginning the *kiais* were reluctant to adopt the classical modern system arguing that with the traditional system, which puts emphasis more on the personal relationship between the *kiais* and the *santris* (strict adherents of Islam), the transfer of Islamic knowledge was easier. After considering that the number of *santris* had increased, who therefore needed more systematic methods in transferring knowledge, the *kiais* accepted the modern educational system. Currently, most *pesantrens* in Indonesia use the classical model of education even though they still use the traditional method as well -- a method mostly conducted at night. In the early 1960s, a number of *pesantrens*, such as Tebuireng and Darul Ulum, adopted a general school system (*SMP* and *SMA*/Junior and Senior High School) with curriculum

stressing on "secular" knowledge. However, even in this regard it is compulsory for the student to live in the dormitory and study Islam at night. Among the four biggest *pesantrens* in Jombang, three of them have established a university, but only the University of Darul Ulum offers a variety of schools with subjects such as agriculture, psychology, law, economics, engineering, nursing, sociology, and politics. Since the 1950s, the government itself has sponsored modern Islamic educational institutions from the primary to the tertiary level.¹³ In the 1960s, when the Ministry of Religious Affairs comprised predominantly of NU members, the government established a number of State Institutes of Islamic Studies (IAIN, *Institut Agama Islam Negeri*). The purpose was to produce Islamic graduates with a modern outlook.

Even though most of the young elites did not obtain most of their education in *pesantrens*, but in secular schools, including universities, they are working in the *pesantrens*, for example, as young *kiais* or as guardian (*pengelola*) of the *pesantren*. The latter is now possible since the *pesantren* has altered its style of management. As has been mentioned, in the past the existence of the *pesantren* was dependent on the figure of the *kiai*. However, coincidental with the transition to the classical model and its more definite curriculum, the management of *pesantrens* has been divided into teacher and guardian sections with the guardian position,

¹² Deliar Noer, *Administration of Islam in Indonesia* (Ithaca: Cornell Modern Indonesia Project, 1978), 25.

¹³ At the primary level, there are three kinds of school. They are: *Madrasah Ibtida'iyah* (the Islamic of primary school), *Tsanawiyah* (the Islamic junior high school), and *Aliyah* (the Islamic senior high school). The tertiary level, is acknowledged as *Institute Agama Islam Negeri* (IAIN: the State Institute of Islamic Studies).

nowadays, held by non-*kiais*. Despite the effort to modernise the *pesantren*, this change is meant to solve the problem of the lack of characteristic *kiais* in the *pesantren*. A young *kiai* who regularly writes columns in local newspapers and magazines explained that the involvement of the family of *kiais* who have non-*pesantren* educational background as guardians has been intended to improve the quality of management in *pesantrens* which were formerly being managed unprofessionally. In addition, as one of the *kiais* of Darul Ulum explained to me, currently the form of leadership in the *Pesantren* is more collective rather than individual in nature. Through such approaches, the lack of charisma among the *kiais* could thus be minimised. It is also, probably, an effort by the *kiais* to guarantee that the leadership of *pesantrens* remains under the control of their family (Even when their children have studied outside the *pesantren* and it is thus difficult for them to be real *kiais*). Clearly, the involvement of a modern school in the *pesantren* also contributes to the acceptance of non-*kiais* in the leadership of the *pesantren*.

The involvement of non-*kiais* in the management of *pesantrens* may be one way available to the children of the *kiais* to ensure the continued existence of the *pesantrens*. A subject told me a story of why he has become a guardian of a *pesantren* though initially he had no intention to hold this position. While studying Islam in the *pesantren* at night, primarily, he studied in modern schools. First of all, he studied in the primary school (*SD*) in his village, Cukir, before continuing to the secondary school (*SMP* and *SMA*) in Jombang, and eventually went to Surabaya to study law at Airlangga University. After graduating from the law

faculty (*Sarjana Hukum*) in 1987, he studied for a notary degree at the same faculty and graduated in 1992. Unfortunately, in the final years of his study, his father, a *kiai*, fell ill and eventually died. Thus, though he had finished his study he went back to Jombang to comply to his mother's wish to continue the leadership of the *pesantren*. He accepted this offer because all of his brothers and sisters are active in business, while the *pesantren* must go on. Now, he has become a guardian of the *pesantren* and said that probably he would never use his acquired skills, including notary expertise, to get a job and salary suited to his expertise. Still, he enjoyed his new position even though it means a simple style of life. He said that it was impossible to meet the costs of the daily needs of his family from his salary in the *pesantren*. To this end, he had to ask his mother and his colleagues to open a canteen which provides food for the students.

Though the young *kiai* has enjoyed his position as a guardian of the *pesantren*, it is evident from the story that, in terms of ownership, there is no significant change in the nature of the *pesantren*. The leadership of *pesantrens* is still under the control of a particular family. This feature is still legitimate as long as the young *kiai* is able to continue the tradition of the *pesantren* and learn how to be a *kiai*. However, according to a young *kiai* who has no blood relationship with the previous *kiai*, young *kiai* candidates need a *pesantren* education to be well-prepared. Further he argued,

If the *kiais* (old *kiais*) want their children to continue the leadership of the *pesantren*, they do not have to send the children to the university. It is better for them to send children to study in the *pesantren*, because in this way the children would know well the tradition

of *pesantrens* as well as become experts in the knowledge of Islam.

The young elites who are active in *pesantrens* are not fully economically dependent on the *pesantrens*. As the young *kiai* described above, others also feel that their salary from the *pesantren* is not sufficient to fulfil the cost of providing for their family. Some subjects use their expertise to obtain additional income, for example, one subject who graduated in medical study opened a general practice; another subject has become a freelance writer for local newspapers and magazines. When I met him, he was reproducing the works of his grandfather, Kiai Hasyim Asyari, and selling them to other *pesantrens*. Two of the young *kiais* are civil servants, one as a teacher in the government school, the other as an employee of the local government. Young *kiais* also become religious lecturers (*penceramah agama*) for the villagers around the *pesantrens* in which helps them to obtain some money. Others become traders in agricultural products, such as rice, sugar, and tobacco. Nevertheless, none of them are full-time traders, as a young *kiai* who only obtained education in the *pesantren* argued:

First, I do not have expertise in trading. If I become a full-time trader, it may be that I would not get benefits. So I just join in with people around here. Sometimes I rent some fields for sugar and tobacco cultivation. In this house, I opened a small shop which is managed by my wife. In this way, I can spend much of my time in managing this *pesantren*.

In addition, some of the young elites obtain income from their profession as politicians, with some being members of local parliament for the period of 1992-1997. Whilst I was conducting my research in 1996, how-

ever, one of them withdrew his membership because of his disappointment with his party. Furthermore, there were only two subjects who are not related to the *pesantren*. One is working as a businessman in second hand goods, another is a kindergarten teacher. In 1994 the latter was elected as a national model kindergarten teacher, meaning he had a chance to attend the Indonesian independence anniversary in the presidential palace in Jakarta.

Political Affiliation of the *Kiai*

Following the government's policy of allowing people to establish their own political parties on 3 November 1945, the Muslim groups carried out the first national congress of Muslims in Yogyakarta on 7-8 November. One of the most important decisions was an agreement to establish the modern Islamic party, *Masyumi* (*Majelis Syuro Muslimin Indonesia* or Consultative Council of Indonesian Muslims), which was considered to be the sole Islamic party in Indonesia. The purpose was to strengthen the position of Muslims in politics. To obtain wide support, the party decided to have two kinds of membership. *First*, were the ordinary members, which meant that all Muslims were invited to become members of *Masyumi* as individuals. *Second*, were the extraordinary members, which consisted of Islamic organisations, particularly NU and Muhammadiyah. In this sense, organisationally, NU was supporter and founding father of *Masyumi*. Its members, including the *kiais*, therefore automatically became members of *Masyumi*. Even Kiai Hasyim Asy'ari and Kiai Wahid Hasyim were appointed as chairman and vice-chairman of the *Majelis*

Syuro (Party Council) respectively.¹⁴ A number of *kiais* in local areas were also active in Masyumi and had important positions in the *Majelis Syuro* of the branches of the *Masyumi* throughout Indonesia.

Nevertheless, not all Islamic organisations joined Masyumi. The *Pergerakan Tarbiyah Islamiyah* (the Movement for Islamic Education, Perti), for instance, founded its own party on 22 November 1945, in Bukittinggi, West Sumatera. This occurred due to miscommunication -- the leaders of Perti did not know that the congress of Muslims decided that Masyumi was the party for all Muslims. It is possible that, if they had known the decision, they would not have established the other party. In addition, the commitment among the founding fathers of Masyumi itself was no longer taking place. Two members from the PSII (the Association of Indonesian Muslim Party),¹⁵ Wondoamiseno and Arudji Kartawinata, decided to split away from the Masyumi, re-establishing the PSII

in 1947. As Kahin has explained, the cause of this split was that the activists of the PSII had taken part in the left-wing Cabinet of Amir Sjarifuddin which replaced the Cabinet of Sjahrir. This decision became controversial because most members of the Masyumi opposed this cabinet because of their ideological differences to Amir Sjarifuddin, a Marxist.¹⁶ As a minor group in the Masyumi, members of the PSII only obtained a small political concession both in the party and in the cabinet. Through the re-establishment of the PSII, they hoped to obtain more political power. Five years later the leaders of NU also decided to get out of Masyumi, and create their own political party, Party NU, a decision taken at the nineteenth congress of NU held in Palembang on 28 April to 1 May 1952, because the elite of NU felt that they were subordinate to "modernist" intellectuals who controlled the leadership of Masyumi.

Essentially, the establishment of NU brought the *kiais* into an era of more political activity. Moreover, as soon as the *kiais* established their own party, the chance to obtain more power seemed to be on the horizon as the government decided to conduct a general election on 29 November 1955. The 1955 general election, however, proved to be a challenge to NU as NU lacked professional politicians. This was made worse by the fact that most leaders of NU were also not educated in the modern schools. Their expertise was more related to religious matters and not to the professional fields, such as economics, accountancy, law, politics and other fields. Indeed, the involve-

¹⁴The institution of leadership in the Masyumi was divided into two parts. The first one was the *Majelis Syuro* (Party Council), and the second one was *Pengurus Besar* (Party Executive). Most members of the *Majelis Syuro* were *kiais* and *ulama*, in particular, those from "traditionalist" group. The *Pengurus Besar* was dominated by "modernist" intellectuals. See, B. Boland, *The Struggle of Islam in Modern Indonesia* (The Hague: Martinus Nijhoff, 1982).

¹⁵PSII was a political party which was established in the Dutch colonialists period. It was originally an Association of Muslim Traders which was founded on 11 November 1911 with purpose of strengthening the position of Muslim traders the competition with Chinese traders and against the suppression of the nobility of Solo. It became active in politics particularly once the leadership came under H.O.S. Tjokroaminoto. See, Deliar Noer, *The Modernist Muslim Movement in Indonesia 1900-1942* (Singapore: Oxford University Press, 1973), 101-153.

¹⁶G. Kahin, *Nationalism and Revolution in Indonesia* (Ithaca: Cornell University Press, 1969), 209.

Table 1

THE FOUR BIGGEST PARTIES IN THE 1955 GENERAL ELECTION

No.	Name of Party	Number of valid	Percentage of total vote	Number of seats
1.	PNI	8,434.653	22.3%	57
2.	Masyumi	7,903.886	20.9%	57
3.	NU	6,955.141	18.4%	45
4.	PKI	6,176.914	16.4%	39

Source: H. Feith, *The Indonesian Election of 1955* (Ithaca: Modern Indonesia Project, Cornell University, 1971), 58.

ment of NU in the Masyumi gave an opportunity for the *kiais* to have more experience of the political game. But, as an independent political party, NU basically needed more professional politicians. To this end, the leaders of NU recruited professionals on the condition that they were followers of the *Sunni* school of thought, although not expert in it.

Even though the party NU was led by those less experienced in politics and professional fields, as Table 1 indicates, the vote for NU in the 1955 general election was surprisingly large, achieving third in the election. This result was spectacular when we consider that NU was a new comer compared to other political parties and in view of the short time between its establishment and the election. As Irsyam argues, "The success of NU was because it changed its campaign strategy".¹⁷ At the beginning, the stress of NU's programs was similar to the Masyumi, that is, on Islam. Realising that this strategy was not of benefit to NU, its leaders looked to distinguish NU from Masyumi, issuing a list of those parties involved in the rebellions. The campaigners of NU argued that a number of member of Masyumi were involved in

Darul Islam in West Java.¹⁸ In addition, to counter those whose ideology was Marxist, NU said that PKI was an actor in the Madiun affair of 1948. Based on this fact, the campaigners of NU warned the voters that to support both Masyumi and PKI means support for the rebels. The best way to vote was for "the clean parties", either NU or PNI.¹⁹ Such tactics probably explain why both NU and PNI obtained about 80 per cent of support from Java, while Masyumi got the majority votes from the Outer Islands and West Java.

Through in the 1955 election, NU became more involved in the political arena, exhibiting strong selfesteem because, in fact,

¹⁸The Darul Islam was rebel group under the leadership of Sekarmadji Maridjan Kartosuwirjo in West Java between 1949 and the early of the 1960s. Its main purpose was to establish an Islamic state in Indonesia. Its appearance, however, was stimulated by rationalisation of the army. After this rationalisation, many Muslims who were active in the revolution of independence were not able to obtain a good position because most of them were not educated in the modern schools. See, C. Dijk, *Rebellion under the Banner of Islam: The Darul Islam in Indonesia* (The Hague: Martinus Nijhoff, 1981); K. Jackson, *Traditional Authority, Islam and Rebellion: A Study of Indonesian Political Behaviour* (California: University of California Press, 1980).

¹⁹It seemed ridiculous because, in the 1955 election and in further political activities, NU was closer to the "*priyayi-abangan*" PNI rather than to the "*santri*" Masyumi.

¹⁷Mahrus Irsyam, *Ulama dan Partai Politik* (Jakarta: Yayasan Perkhidmatan, 1984), 33.

NU had a huge supporter base. NU took part in the parliament and the cabinet and, as noted earlier, even supported the authoritarian Guided Democracy of President Soekarno. Actually when Soekarno declared this sort of government, a number of NU leaders opposed and rejected the move to join it because it was seen to be undemocratic and to tilt to the PKI (Indonesian Communist Party). However, the strong leader Kiai Wahab Chasbullah, argued that it was better to take part in the government as leaving it was easy, that is, "enter first; leaving is easy" (*masuk dulu, keluar gampang*). Kiai Wahab also referred to the religious consideration, that "if something cannot be fully attained, it should not be left undone".²⁰ However, when Soekarno seemed reluctant to solve the problem of the September upheaval in 1965, the more radical group within NU was more powerful. Its member, Achmad Sjaichu, a leader of the DPR (People's Representative Council), proposed a memorandum to conduct an extraordinary session of the MPRS (Provisional People's Consultative Assembly) to demand an account of responsibility by President Soekarno. This is basically one of the most significant event in Indonesian political history as the MPRS rejected the level of accountability exhibited by Soekarno and withdrew the authority given to the president. The MPRS also elected a new President, Soeharto.

The relationship between NU and the New Order government in the early years was quite close and good. Tensions in the relationship appeared, however, after the government seemed to hesitate in giving polit-

ical concessions to the Muslim forces, mainly NU, and the government suspected the Muslims of backing the idea of an Islamic state.²¹ It was more obvious in the 1971 election. This was the first election in the New Order government and initially the response of the political parties was quite good. However, the political parties became disgruntled when it became evident that this was just a way the government was using to obtain legitimacy and that it intended to set up a dominant party. Nevertheless, from the nine political parties, NU was the only party which was able to maintain its position, and even to increase its votes. The results of the election show that although the percentage was similar, i.e. 18.67 per cent, NU become the second winner of the 1971 election. In East Java, the gaining of vote of NU was quite substantial. In some regions, such as in the districts of Madura Island, Surabaya, Pasuruan, Bondowoso, and Panarukan, NU was the winner of the election, defeating the ruling party of Golkar.²² In Jombang, the results obtained by NU were also relatively significant, even though it was defeated by Golkar. As evident in Table 2, in the sub-districts, where many *pesantrens* exist such as Diwek, Peterongan, Ngoro, Sumobito and Mojowarno, NU was the winner.

NU fused into the PPP, in 1973, after the government simplified the political parties. NU was initially a dominant group in terms of leadership and membership in this party,

²⁰A. Wahid, "Islam in Indonesia: Where to?" *Inside Indonesia* 8 (1986): 3.

²¹A. Feillard, "Traditionalist Islam and the Army in Indonesia's New Order", in G. Barton and G. Fealy (eds.), *Nahdlatul Ulama, Traditional Islam and Modernity in Indonesia*.

²²K. Ward, *The 1971 Indonesian Election: An East Java Case Study* (Clayton: Centre of Southeast Asian Studies Monash University, 1974).

Table 2

THE RESULT OF THE 1971 GENERAL ELECTION IN JOMBANG

No.	Name of Sub-	Name of Party			
	District	Golkar	NU	PNI	Other Parties*
1.	Jombang	23,412	13,332	1,257	1,338
2.	Diwek	9,966	17,295	579	722
3.	Gudo	11,705	5,291	2,195	510
4.	Perak	14,782	14,522	219	1,128
5.	Tembelang	17,496	14,338	1,735	1,032
6.	Ploso	9,618	2,961	1,350	275
7.	Kabuh	12,454	799	2,520	1,011
8.	Kudu	12,857	4,638	365	177
9.	Planda'an	9,120	4,560	2,020	216
10.	Mojoagung	12,017	8,730	148	566
11.	Peterongan	9,960	24,730	638	1,230
12.	Sumobito	11,407	10,900	87	1,536
13.	Kesamben	10,864	9,705	373	872
14.	Ngoro	10,614	11,503	1,011	612
15.	Mojowarno	9,181	13,738	3,021	1,674
16.	Bareng	10,168	4,777	1,541	658
17.	Wonosalam	8,012	144	880	208
Total Voters		203,633	161,913	19,939	12,663

*Other parties consisted of Party Katolik, PSII, Parmusi, Parkindo, Murba, Perti and IPKI. The total votes of these parties were 201; 1,513; 7,704; 1,806; 83; and 528 respectively.

Source: DPC PPP Jombang.

which was a sort of confederation among four Islamic political parties. The position of NU became less significant when the old conflict between the "modernists" and "traditionalists" erupted again in 1978. The "modernists", essentially a minority within the PPP, succeeded in kicking out the vocal politicians of NU because it was supported by those of the apparatuses which relate to social and political affairs. However, as most members of NU still channelled their political aspirations to the PPP -- the PPP votes gained in the mass-based areas of NU, including Jombang, were relatively significant. The exception was in the 1987 general election. This was the first election following NU's declaration to return to the spirit of 1926 and move away from direct political involvement. As a consequence, the leaders of

NU argued that members of NU were free to work through their own political channels. To support this decision, a number of leaders campaigned that it was not compulsory any more for the *nahdliyin* (NU members) to choose the PPP. This campaign is called *aksi penggemboan* (deflating action). As a consequence, many members of NU who previously were supporters of the PPP, moved to other parties, in particular, to Golkar. In the 1992 and the 1997 general election, as evident in Table 3, a number of NU supported the PPP.²³ This may be due to the fact that the leaders of the PPP, which was dominated by a "NU faction", as a consequence of Jombang being a district of NU

²³This is inferred because the majority of people in PPP in Jombang are NU supporters.

Table 3

THE VOTE GAINING OF THE PPP IN THE 1977, 1982, 1987, 1992, AND 1997 ELECTION

No.	Name of Subdistrict	PPP (The United Development Party)				
		1977 (%)	1982 (%)	1987 (%)	1992 (%)	1997 (%)
1.	Jombang	33.68	35.33	20.12	23.37	41.53
2.	Diwek	53.00	55.68	39.92	42.87	58.76
3.	Gudo	26.00	27.53	16.79	18.96	34.76
4.	Perak	48.00	48.46	19.79	28.34	42.06
5.	Tembelang	40.30	42.87	25.81	27.87	39.03
6.	Ploso	19.65	19.12	10.45	12.19	25.40
7.	Kabuh	3.98	4.49	1.98	3.46	8.88
8.	Kudu	20.47	21.71	13.40	16.66	22.01
9.	Plandaan	24.34	13.42	9.90	10.26	17.39
10.	Mojoagung	44.84	46.58	27.89	34.25	48.11
11.	Peterongan	65.58	62.68	35.56	40.12	52.74
12.	Sumobito	54.95	57.25	38.40	40.22	58.25
13.	Kesamben	44.67	44.41	20.87	26.70	42.53
14.	Ngoro	48.77	51.48	34.16	37.18	49.31
15.	Mojowarno	48.11	51.39	39.37	42.88	54.08
16.	Bareng	27.66	29.43	18.44	25.02	40.34
17.	Wonosalam	3.41	5.43	1.72	4.75	12.49
18.	Megaluh			24.83	27.95	45.89
19.	Bandar Kedung Mulyo			39.20	48.17	58.34
20.	Jogoroto			45.90	51.53	61.80

*Since the 1987 election, the number of subdistricts in Jombang rose to 20 after the government added three sub-districts: Megaluh, Bandar Kedung Mulyo, and Jogoroto.

Source: DPC PPP.

or well-known as a district of *pesantren*, approached the leaders of NU and its members, and that the majority of local parliament members of the PPP are from NU.

Political Affiliation of the Young Elites

The numbers of the young elites in NU has grown in the New Order government. Some of them also witnessed the situation in the 1960s, and the transition between the Sockarno government to the New Order government, though at this time they were still children. They knew the ways their parents and the elites of the NU in general played politics and channelled their political interests through NU and the PPP. Also, all of

them already had the right to take part in the elections when NU was still active in politics and affiliated with the PPP. The majority of those who took part in the 1977 election chose the PPP. However, three of the young elites affiliated with the ruling party of Golkar. Unlike the other *kiais* who joined the PPP, one of the popular *kiais*, a leader of *tariqah* (sufi order) and a guardian of Pesantren Darul Ulum, Kiai Mur'tain Romli, joined Golkar. The reason behind this extraordinary decision,²⁴ as explained to me by one of his sons is that it was not compulsory for him and for other Muslims to join PPP

²⁴ It was called extraordinary decision because the majority of *kiai* supported the PPP, even declaring that all Muslims should (*wajib*; compulsory) choose the PPP.

because NU was only part of the party. The essence of the political party itself was described as an empty glass. It could be filled with coffee, tea or whatever anybody liked. Thus, it was his responsibility to fill Golkar with the values of Islam.²⁵ As a consequence of this decision a number of *santris*, including the family of Pesantren Darul Ulum, also joined Golkar. Interestingly, one of his nephews explained that, in the 1977 general election, he only choose Golkar for the national parliament.²⁶ For the district and provincial parliament he choose PPP. He argued that he choose Golkar for the national parliament because Kiai Musta'in Romli was a candidate, and he choose PPP in the district and provincial parliament because he already personally knew the candidates from PPP. In addition, the joining of the Pesantren Darul Ulum into the ruling Golkar initially brought many consequences with it. Many *kiais* in Jombang and other parts throughout Indonesia accused Kiai Mus'tain of favouring work with the secularists rather than with the Muslims. This perception of Kiai Musta'in was understandable as, at the time, the PPP was considered by the *kiais* as the only party for Muslims. Another consequence, brought to my attention by someone, who is a doctor, was that about fifty per cent of *santris* (students) in Pesan-

tren Darul Ulum moved to other *pesantrens*. The condition became normal again in the 1980s after NU decided to return to the *khittah* 1926.

Currently, many of the young elites favour channeling their political interests to PPP. Of the twenty subjects interviewed, nine declared that they are supporters of PPP. The main reason for this allegiance is that this party is still committed to struggle (*memperjuangkan*) for the values of Islam. A young *kiai*, who has a legal background, explained that he and his family affiliated with PPP because all of its leaders are Muslims. Further he argued, "if I choose Golkar or PDI it means I also choose non-Muslims as my representatives because the leaders of these parties are not only Muslims". Interestingly, the same reason was also mentioned by those who channelled their political aspiration to the Golkar. For them, even though the Golkar is not an Islamic party, its programmes also include the implementation of the values of Islam. Further, one of the subjects explained that the contribution of the New Order government to the development of Islam in Indonesia since the last decade has been very impressive. The government, for example, organised the collection of money to build hundreds of mosques throughout Indonesia, which has helped Islamic activities. Thus, they argued that more Islamic programs have been implemented in the New Order government. Another interesting insight gleaned from the interviews is that brothers are not necessarily aligned with the same party. For example, one subject who joined the Golkar has a brother affiliated with PPP. When I asked for an explanation he answered,

²⁵This decision, however, cannot be separated from the effort of the government to obtain as much support as possible for the ruling party, Golkar. The prominent figure and the architect of the political reformation of the New Order, Ali Moertopo, made special contact with a number of *kiais*, including Kiai Mus'tain Romli.

²⁶In Indonesia, the election was intended to choose three kinds of parliament: national parliament, province parliament and district parliament. All of the were conducted at the same time.

Formerly my brother was a supporter of Golkar when he was active as a contractor with the *Pemda* (local government) as his counterpart. Now he moved to PPP and become a member of parliament from this party. So, basically I just replaced his position.

Further, he explained that his brother joined PPP when his (brother's) contract with the *Pemda* was dropped. What is also interesting is that both of these brothers were candidates to become members of local parliament for the 1997-2003 period, with one standing for Golkar and other for PPP.

Three of the young elites, however, said that they would leave PPP and become *golput* ("white group"/the unaffiliated voters)²⁷ in the 1997 general election, as in their assessment, the conditions of political life in Indonesia are not suitable for the involvement of people in the political process. The condition of PPP is basically similar to Golkar and PDI, though PPP claims that it is the representative of Muslims. In effect, none of the parties could maximise their efforts to articulate and aggregate the interests of the people because they are under the control of the government. They claimed that they were asked to join PPP and PDI respectively. However, they refused to give the reason that they probably could not do anything when they become members of parliament because the decisions or parliament are basically controlled by the government. Nevertheless, one subject, who

graduated from educational studies, added that it is possible that one day he would join one of the parties if the conditions of the political game in Indonesia become fairer, such as he could articulate his, and his supporters' interests.

Conclusion

The resources for the NU elites are basically similar to the resources used by other elites in general. That a group of people have a particularly extra ability from the rest of society, both economically and non-economically, is a potential resource which enables some people to become considered as the elite of society. The *kiais* are elite figures in the religious community of NU. Their ability in the field of the spiritual, such as their deep knowledge and understanding of the teachings of Islam, together with the fact that economically they are placed in the high strata of the society, contributes to the notion that they are elites. Nevertheless, there is a different social background between the *kiais* and the young elites of NU. While *kiais* in the past spent their time studying in the *pesantrens*, the young elites obtained education in the universities, instead of the *pesantrens*.

This feature influenced the position of the young elites in the *pesantren* and society. While in the past the *kiai* was a guardian and centre for the knowledge of Islam in the *pesantren*, now those young elites who are involved in the *pesantren* are more likely to be the guardians of *pesantren* (except for those who spent most their educational years in the *pesantren*). This condi-

²⁷The declaration of *golput* was launched on 28 May 1971, by a number of pro democracy activists, such as Arief Budiman. This is a protest movement in opposition to the New Order government which produced the unfair rules of the game responding the political parties and the general election. See Arbi Sanit, *Aneka Pandangan Fenomena Politik Golput* (Jakarta: Pustaka Sinar Harapan, 1992).

tion could happen because, right now, there is a separation of management in the *pasantren* between those who hold the foundation (*yayasan*) or position as guardian, and those who are involved in the teaching process. The people in these positions have similarities as well as differences. Economically, the position of the young elites is similar to the old elites, to some extent, in the sense that they are not fully dependent on the *pasantren*. Like the old elites, the young elites also obtain income from the economic activities outside of the *pasantren*, such as from traders of agricultural products. Even the young elites who are not directly involved in the *pasantren* obtain income from

professional activities such as teachers and businessmen.

Their differences concern issues of political affiliation. Formerly, the *kiais* channeled their political interests through a particular party -- through Masyumi, from the early years of independent until 1952, through the NU party, from 1952 to 1973, and through the PPP, from 1973 to 1984. Though the political affiliation of the young elites are still concentrated on the PPP, some of them now support the ruling group of Golkar. This difference has been possible made because NU itself decided to allow its members the freedom to affiliate with any of the available political parties.

The Current Legal Status of Transit Passage: Analysis of State Practice Before and After the LOSC

Farhad Talaie

Introduction

ALTHOUGH attempts were made at the Third United Nations Conference on the Law of the Sea (UNCLOS III) to end conflicts over the issue of the passage through international straits and carefully drafted rules were codified, there still exist different standpoints on the legal status of the new regime of passage through international straits. The issue has mainly arisen from the position of the USA with respect to the right of transit passage, the position which is opposition to the view asserted by a number of strait States.¹ While

the USA has claimed that the provisions of the LOSC with respect to transit passage through international straits (Part III) reflect international customary law, a number of strait States (such as Iran) have rejected such a claim and consider these provisions to be of contractual value lacking a basis in international traditional or customary law.

The USA claims that it is entitled to exercise transit passage through international straits as described in Part III of the LOSC even if it decides to remain a non-party to

¹In his analysis of State practice, Yturriaga examines the views of a number of States as supporters of transit passage through international straits and those (mainly strait States) as supporters of innocent passage through these straits. Yturriaga names the following States as the supporters of transit passage: Australia, France, Germany, Japan, South Korea, the former Soviet Union, United Kingdom, and United States. However, practices of some of these States (such as Germany, Japan, South Korea, and the former Soviet Union) indicate that they are reluctant to extend the right

of transit passage to its adjacent straits through different ways whether by freezing their territorial sea to 3 nm or by rejecting the international use of the straits Yturriaga also names the following States as supporters of the right of innocent passage through international straits: Egypt, Indonesia, Iran, Malaysia, Morocco, Oman, the Philippines, Yemen, and Yugoslavia. For practices of the supporters of transit passage and of innocent passage through international straits see Yturriaga, José A. de, *Straits Used for International Navigation: A Spanish Perspective* (Dordrecht: Martinus Nijhoff Publishers, 1990), 308-327.

this Convention. In contrast, many strait States have argued that the only way for the USA or other maritime powers to benefit from the provisions on transit passage is to become a party to the Convention. They argue that these special provisions constitute part of a "package deal" of the Convention and only have the value of conventional rules.² The package deal nature of the LOSC prevents its parties from accepting some parts of the LOSC while rejecting the other parts of the Convention. The Convention should be accepted as a whole and it is impossible for a party to accept the Convention only in part.

It is important to find the legal scope of the right of transit passage because of its implications for parties and non-parties to the LOSC. If transit passage is recognised as a customary rule, the result of such recognition is that non-parties to the LOSC are not to be excluded from the provisions of the LOSC on the transit passage. It is, therefore, necessary to examine practice of States regarding passage through international straits before and after the LOSC to assess the legal status of passage through international straits in both periods of time. This examination will be based particular-

²Although one of the publications of the UN Office of Legal Affairs (Division for Ocean Affairs and the Law of the Sea) in 1994 asserts that "the regime of transit passage has been widely accepted in general terms by the international community", it also states that the solution of the issue of passage through straits used for international navigation "constituted one of the fundamental elements of the 'package deal', on the basis of which the draft Convention was negotiated". *The Law of the Sea: Practice of States at the time of entry into force of the United Nations Convention on the Law of the Sea*. Division for Ocean Affairs and the Law of the Sea, Office for Legal Affairs, United Nations, New York, 1994, 8.

ly on the rules embodied into the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone (TSC)³ and the LOSC.

States Practice on the Passage Through Straits: Period After the TSC and Before the LOSC

Following the failure of the First United Nations Conference on the Law of the Sea (UNLOS I) to determine the breadth of the territorial sea, the number of States supporting a twelve mile limit for territorial seas increased. The increased in the number of states claiming the twelve mile limit continued when the Second United Nations Conference on the Law of the Sea (UNCLOS II) did not succeed in establishing the breadth of the territorial sea in manner acceptable to all participating States.

The escalating of States' claims to have more extensive territorial seas than the three mile limit advocated by most maritime powers led to the incorporation of a large area of the high seas into territorial seas. Such an extension was more problematic in straits because a large number of straits were overlapped by territorial seas of bordering States. Maritime powers (including the USA and the UK) considered such extensions of the breadth of the territorial seas as threat to the freedom of the high seas. This was a motive for the maritime powers to establish a special regime of passage through straits ensuring their interests in the high seas.

On 18 February 1970, "for the first time" John R. Stevenson, Legal Adviser to the State Department of the USA, stated that

³Geneva Convention on the Territorial Sea and Contiguous Zone (1958), 516 UNTS 205 (1964).

"there had been a great deal of support for fixing the breadth of the territorial sea at twelve miles."⁴ However, he, *inter alia*, added that the convention incorporating a twelve mile territorial sea "should provide for freedom of transit through and over international straits."⁵ On 25 February 1970 the State Department of the USA reiterated Stevenson's statement.⁶

On 23 May 1970, Nixon, President of the USA, as a part of his declaration, "United States Policy for the Seabed", stated:

It is equally important to assure unfettered and harmonious use of the oceans as avenue of commerce and transportation and as a source of food. For this reason the United States is currently engaged with other states in an effort to obtain a new law-of-the-sea treaty. This treaty would establish a twelve limit for territorial seas and provide for free transit through international straits. It would also accommodate the problems of developing countries and other nations regarding the conservation and use of the living resources of the high seas.⁷

Although this declaration refers to "free transit through international straits", it does

not state what free transit means and how far it extends. However, for the first time the USA made its position on free transit clear when submitted its Draft Articles on the Breadth of the Territorial Sea, Straits, and Fisheries to the UN Committee on the Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction on 3 August 1971.⁸ Article II of this Draft reads:

In straits used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign state, *all ships and aircraft* in transit shall enjoy the same freedom of navigation and overflight, for the purpose of transit through and over such straits, as they have on the high seas. Coastal states may designate corridors suitable for transit by all ships and aircraft through and over such straits. In the case of straits where particular channels of navigation are customarily employed by ships in transit, the corridors, so far as ships are concerned, shall include such channels.⁹

In 1973, in reaction to the USA proposal some straits States¹⁰ submitted *Draft Articles on Navigation Through the Territ-*

⁴Oda, Shigeru, "Proposals regarding a 12 mile limit for the territorial sea by the United States in 1970 and Japan in 1971: Implications and Consequences", *Ocean Development and International Law* 22, no. 2 (1991): 190.

⁵*Ibid.*

⁶In an announcement, the State Department of the USA declared that: "The United States supports the 12-mile limit as the most widely accepted one, but only if a treaty can be negotiated which will achieve widespread international acceptance and will provide for freedom of navigation through and over international straits. At the same time the United States will attempt to accommodate the interests of coastal states in the fishery resources off their coasts". *Ibid.*, 196, footnote 3.

⁷*Ibid.*, 190.

⁸UN Doc. A/AC.138/SC.II/L.4, 3 August 1971. The US Draft Articles on Territorial Sea, Straits, and Fisheries submitted to UN Seabed Committee were also reproduced in *Bulletin of the US Department of State* 65, no. 1680 (6 September 1971): 261-268.

⁹Pirtle, Charles E., "Transit Rights and U.S. Security Interests in International Straits: The 'Straits Debate' Revised", *Ocean Development and International Law* 5, no. 4 (1978): 480-481.

¹⁰These strait States were Greece, Cyprus, Indonesia, Malaysia, Morocco, Spain, Yemen, and the Philippines. *Ibid.*, 483. See UN Doc. A/AC.138/SC.II/L.18, 27 March 1973. Also see the draft submitted by Malaysia, Morocco, Oman, and Yemen to the Caracas Session of the UNCLOS III. UN Doc. A/CONF.62/C.2/L.16, 22 July 1974.

orial Seas, Including Straits Used for International Navigation to the Second Committee of the UNCLOS III. This proposal rejected the right of overflight and submerged passage through straits.¹¹ It also provided a requirement of prior notification or authorisation for warships' passage.¹² This example indicates that, in the initial stages of the UNCLOS III, there was no agreement on right of overflight or submerged passage through international straits.¹³

It is understandable that before the UNCLOS III there was no doubt that the only acceptable regime of passage through international straits was innocent passage which could not be suspended. The UNCLOS III was the first international forum to discuss the scope of the right which was later

¹¹Also, at the Caracas Session of the UNCLOS III (1974) the Danish delegate stated that "in the case of 'new' straits up to a breadth of 24 miles, there might be a need for a new regime of free transit passage". However, he was of the view that there was no need "to change the rules of innocent passage through straits less than 6 miles wide, where the right of free passage and overflight had never existed". *The Law of the Sea -- Straits Used for International Navigation: Legislative History of Part III of the United Nations Convention on the Law of the Sea*, Volume II, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, New York, 1992, 36.

¹²Pirtle, "Transit Rights and U.S. Security ...", 483.

¹³Oelofsen, P.D., "Third United Nations Conference on the Law of the Sea -- Passage through straits used for international navigation", *Comparative and International Law Journal of Southern Africa* 8, no. 3 (1975): 377. In the 1973 declaration of the Organisation of African Unity, it was provided "[t]hat the African States in view of the importance of international navigation through straits used as such endorse the regime of innocent passage in principle but recognise the need for further precision". *Ibid.*

called "transit passage."¹⁴ In fact, before the UNCLOS III there was no State practice in the form of transit passage as reflected into the LOSC. Even in certain straits which included high seas routes, the principle of the freedom of the high seas was implemented. Although in these cases there existed the freedoms of navigation and overflight, such exercises were not under the new regime of transit passage. The transit passage regime is not identical with the regime of navigation and overflight under the principle of the freedom of the high seas. This is because under the regime of transit passage, straits States are given certain powers which do not in exist on the high seas. As a result, there was no question of exercising the right of transit passage through straits. The lack of State practice in relation to the transit passage through straits in the period before the UNCLOS III suggests that such a regime of passage was not crystallised into any rules of the law of the sea. This is because not only the material element of a customary rule but also the psychological element of such rule (that is *opinio juris*) did not exist with respect to the concept of transit passage.

¹⁴It was in the UK proposal (draft articles on the territorial sea and straits) at the Caracas Session of the UNCLOS III (1974) that the term "transit passage" was first used. Article 1 (1) of the draft stated that in straits used for international navigation "all ships and aircraft enjoy the right of transit passage". Article 1 (2) of the draft defined the transit passage as "the exercise ... of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas and another part of the high seas or a State bordering the strait". See UN Doc. A/CONF.62/C.2/L.3, 3 July 1974.

In the UNCLOS III, different proposals concerning passage through international straits were presented.¹⁵ Eventually, following a compromise made in the Conference, special provisions were incorporated in Part III of the LOSC that deals with passage through international straits. These provisions provide three possible passages through different straits. They are, non-suspendable innocent passage, transit passage, and passage exercised in accordance with the principle of freedom of the high seas.

Article 38(2) of the LOSC, which can be considered as a new development in the Law of the Sea, for the first time provides a definition of the right known as "transit passage". It reads, *inter alia*:

Transit passage means the exercise in accordance with this Part [Part III of the LOSC] of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic

zone and another part of the high seas or an exclusive economic zone.

It is clear that overflight and submerged passage through the high seas are among the freedoms of the high seas. However, before the LOSC, such passage have not been exercised over and under territorial straits without controversy because these straits had been overlapped by the territorial seas of 12 miles or less than 12 miles in width. In such straits only ships could pass, and submarines had to traverse on the surface and show their flags. If there were cases of frequent passages over or under territorial straits that occurred without protest from strait States, then it would be necessary to examine whether provisions of Part III on transits passage had become part of international customary law though State practice and *opinio juris*.

Reference was made to transit passage in a few treaties before the LOSC which may lead one to suggest that such reference is an indicator of existing law and may create impacts beyond the effect of treaties. An example is the 1978 Torres Straits Treaty between Australia and Papua New Guinea (the Torres Strait Treaty).¹⁶ This Treaty was concluded before the conclusion of the LOSC. Article 7 of this Treaty is devoted to the Freedoms of Navigation and Overflight in the Protected Zone¹⁷ within the Torres Strait. Paragraph 6 of this article, *inter alia*,

¹⁵For example, the proposals on straits used for international navigation which were submitted at the Second Session of the UNCLOS III (Caracas, 20 June - 29 August 1974) included the following: (a) the UK draft articles on the territorial sea and straits; (b) the draft articles by Spain on the nature and characteristics of the territorial sea (Article 3: Straits forming part of the territorial sea); (c) Draft articles on strait used for international navigation submitted by Bulgaria, Czechoslovakia, the German Democratic Republic, Poland, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics; (d) draft articles on navigation through the territorial sea, including straits used for international navigation submitted by Malaysia, Morocco, Oman and Yemen; and (e) Fiji's draft articles on navigation through the territorial sea, including straits used for international navigation (Revised). For proposals on passage through straits used for international navigation see *The Law of the Sea -- Straits Used for International Navigation; Legislative History of Part III of the United Nations Convention on the Law of the Sea*, Vol. II.

¹⁶Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and Related Matters, Sydney, 18 December 1978. 18 ILM 291 (1979).

¹⁷See Article 7(1) and Part 4 of the Torres Strait Treaty (Articles 10-19) for the definition and the

states if transit passage were not to be included into the LOSC or "fail to become a generally accepted principle of international law the parties shall consult with a view of agreeing upon another regime of passage that is in accordance with international practice."

Treves assert that such a reference demonstrates that the parties have considered that transit passage as part of customary law, because the parties have so far undertaken no consultation relating to the above provision.¹⁸ This viewpoint is debatable. *First*, according to Article 7(1), the freedoms of navigation and overflight defined in the Treaty have been accorded only to the parties and it does not include any provision as to the extension of these freedoms to non-parties.¹⁹ In addition, Article 7(7) of the Treaty provides that "[t]he rights of navigation and overflight provided for this Article [Article 7] are in addition to, and not in derogation of, rights of navigation and overflight in the area concerned under other treaties or general principles of international law." *Secondly*, it should also be noted that in international law, customary law and general principles of international law do not have equal value. In other words, in the event of contradictions between an international customary rule and a general prin-

legal regime governing the Protected Zone within the Torres Strait.

¹⁸Treves, Tullio, "Navigation", *A Handbook on the New Law of the Sea*. Edited by: Rene-Jean Dupuy and Daniel Vignes, Vol. 2 (Dordrecht: Martinus Nijhoff Publishers, 975.

¹⁹Article 7(1) of the Torres Strait Treaty, *inter alia*, provides that in the Protected Zone "each Party shall accord to the vessels and aircraft of the other Party ... the freedoms of navigation and overflight associated with the operation of vessels and aircraft on or over the high seas" (*emphasis added*).

ciple of international law, the former is considered to prevail over the latter.²⁰ This is based on Article 38(1) of the Statute of the ICJ which implicitly provides a system of hierarchy regarding sources of international law. Since customary international law is mentioned before general principles of international law, it may be argued that a rule of customary international law prevails a general principle of international law in the event of any contradiction between them. As a result, it was clear that in the view of the parties of the Torres Strait Treaty, transit passage was not considered to have the value of customary rule. This interpretation governs the above-mentioned provision unless the parties are prepared to change this provision. In addition, bilateral treaties cannot bring an international customary rule into existence. Rules of bilateral treaties are only applicable to their parties, unless there are many bilateral treaties which contain similar rules and consequently the range of application of these rules go beyond the parties.

A statement of 1978 by the British government should also be noted. This statement indicated that the regime of transit passage, as defined in Article 38(2) of the LOSC, did not exist in the framework of the law of the sea before the conclusion of the LOSC. In 1978 the British government stated that "[a]t present there is no right

²⁰Referring to work of the PCIJ's Advisory Committee of Jurists (1920), Akehurst writes that general principles of international law "can ... be applied only in the absence of rules (or at least specific rules) of treaty or customary law". He adds that "it is permissible to use general principles of (municipal) law to interpret treaties and customs". Akehurst, Michael, "The Hierarchy of the Sources of International Law". *BYIL*, Vol. 47, 1974/1975. 273-285, at 279.

of overflight over territorial waters, including those which constitute the waters of straits used for international navigation.”²¹ (emphasis added) This statement is note worthy because the right of overflight is an essential part of the regime of transit passage.

The 1979 Treaty of Peace between Egypt and Israel is also worthy of examination. This treaty established the regime of passage through the Strait of Tiran. Article V-2 of the Treaty provided that “the Strait of Tiran and the Gulf of Aqaba are international waterways open to all nations for unimpeded and non-suspendable freedom of navigation and overflight.”²² It further stated that “[t]he Parties will respect each other’s right to navigation and overflight.”²³ Although the Treaty guaranteed navigation and overflight, its range of application was limited to the Strait of Tiran. In other words, the Treaty came into being as a consequence of agreement between the two parties without affecting other States. This means that the regime of passage accepted for the Strait of Tiran was established in the same manner as those treaties concluded for establishing special regimes for passage through certain straits such as the

strait of Magellan.²⁴ Passage through this Strait is governed by the Treaty of 23 July 1881 concluded between Chile and Argentina. Article V of this Treaty provided that “Magellan Straits are neutralised for ever, and free navigation is guaranteed to the flags of all nations.”²⁵ Such treaties on specific straits did not establish a general legal regime for passage through other international straits.²⁶

²⁴During the final part of the 11th Session of the UNCLOS III (6-10 December), the Israeli delegation quoted the statement made by the US representative concerning the status of passage through the Strait of Tiran on 29 January 1982. This representative stated that “[t]he United States fully supports the continuing applicability and force of freedom of navigation and overflight for the Strait of Tiran and the Gulf of Aqaba as set out in the Peace Treaty between Egypt and Israel. In the United States view, the Treaty of Peace is fully compatible with the Law of the Sea Convention and will continue to prevail. The conclusion of the law of the sea will not affect those provisions in any way”. *The Law of the Sea -- Straits Used for International Navigation; Legislative History of Part III of the United Nations Convention on the Law of the Sea*, Vol. II, 150. The statement was made since the transit passage was not extended to straits which link the high seas to the territorial sea of a State (which is the case of the Strait of Tiran with respect to Israel). The LOSC only recognises the right of non-suspendable innocent passage for these strait. This regime of passage does not allow overflight and submerged passage within those straits. The 1979 Treaty of Peace clearly permits the right of overflight in addition to free navigation within the strait of Tiran.

²⁵Article V of the Treaty between Argentine Republic and Chile Defining the Boundaries between the Two Countries (concluded on 23 July 1881 and entered into force on 22 October 1881), reproduced in Singh, Nagendra, *International Maritime Law Conventions (4 Vols.)*, Vol 4; *Maritime Law* (London: Stevens & Sons, 1983). 2821.

²⁶In fact, it was to the purpose of uniform rules for the passage through international straits that the TSC and later the LOSC, in more detailed provisions, provided rules on the passage through these straits.

²¹Akehurst, Michael, *A Modern Introduction to International Law*, Sixth Edition (3rd impression), Harper Collins Academic, London, 1991, p. 176.

²²*ILM*, Vol 18, 1979, 362-393, at 362. Lapidoth writes that the reference to “unimpeded and non-suspendable navigation and overflight” in the 1979 Treaty of Peace indicate that “the passage through a gulf bordered by several states, not all of which are littorals of the entrance of the gulf, should be subject to the regime of straits”. Lapidoth, Ruth Eschelbacher, *The Red Sea and the Gulf of Aden* (The Hague: Martinus Nijhoff Publishers, 1982), 126.

²³*ILM*, Vol. 18, 1979, 362.

As the facts presented above indicate, there is no doubt that prior to the LOSC the new concept of transit passage through international straits did not broadly exist in State practice. This is particularly supported by the fact that no existing treaty provided passage through *all* international straits that could be equivalent to the regime of transit passage embodied in the LOSC. In addition, before the codification of the LOSC, there was no evidence that transit passage had crystallised into a rule of customary international law. Although the freedoms of the high seas were exercised in certain straits given the existence of a high seas route within these straits, they were not exercised under the legal regime of transit passage. This is based on two facts: (a) first these straits were not overlapped by territorial seas to raise the issue of a special regime of passage through these straits; and (b) secondly passage through the middle route within the straits was subject to the freedoms of the high seas, not the regime of transit passage which is not as free as the former regime.

Legal Status of Transit Passage After the Codification of the LOSC

At the time of the signing of the LOSC (10 December 1982), a considerable number of States made declarations clarifying their viewpoints on some provisions of the Convention. Some of these declarations referred to provisions on transit passage (Part III).²⁷ Iran, for example, explicitly declared that

provisions on transit passage, as embodied in Part III of the LOSC, do not constitute international customary law. In its declaration, Iran, *inter alia*, asserted that:

Notwithstanding the intended character of the Convention being one of general application and of law making nature, certain of its provisions are merely product of *quid pro quo* which do not necessarily purport to codify the existing customs or established usage (practice) regarded as having an obligatory character. Therefore, it seems natural and in harmony with article 34 of the 1969 Vienna Convention on the Law of the Sea, that only States parties to the Law of the Sea Convention shall be entitled to benefit from the contractual rights created therein.

The above considerations pertain specifically (but not exclusively) to the following:

- The right of transit passage through straits used for international navigation (part III, section 2, article 38). ...²⁸

This view, which has been the common position of a number of strait States in the UNCLOS III, cannot be overlooked as they are directly affected by the new legal re-

Nations Convention on the Law of the Sea, Vol. II, 154-157.

²⁸*The Law of the Sea; Status of the United Nations Convention on the Law of the Sea*, Office of the Special Representative of the Secretary-General for the Law of the Sea, United Nations, New York, 1985, pp. 17-18 at 18. In its note of 30 April 1987, the United States of America stated that it rejects that "... [the] right of transit passage through straits used for international navigation, as articulated in the Convention [LOSC], are contractual rights and not codification of existing customs or established usage. ...[The regime of transit passage], as reflected in the Convention, [is] clearly based on customary practice of long standing and reflects the balance of rights and interests among all States, regardless of whether they have signed or ratified the Convention ...". *Limits in the Seas*, no. 112. Office of Geographer, Bureau of Intelligence and research, the United States Department of State, Washington D.C., 1992, 67.

²⁷See the relevant parts of the declarations of Chile, Finland, Greece, Iran, Iraq, Oman, Philippines, Spain, Sweden, and Yemen reproduced in *The Law of the Sea -- Straits Used for International Navigation: Legislative History of Part III of the United*

gime on passage through straits. This is worthy of note because strait States may rely on the contractual value of the transit passage and continue to recognise the traditional right of passage through the straits they border under the right of innocent passage. For example, Iran and Oman are the bordering States of the strategic Strait of Hormuz which links the Persian Gulf through the Gulf of Oman to the Indian Ocean. These countries have long been in favour of a right of innocent passage through the Strait of Hormuz.²⁹

As the one of the strait States bordering the Strait of Bab-al-Mandeb,³⁰ Yemen has

²⁹Iran has signed the LOSC but has not yet ratified it. There is no provision on the transit passage in the 1993 Iranian Act on the Marine Areas. Instead, the Act contains provisions on innocent passage of foreign ships (Articles 5-11). See *The Law of the Sea: National Legislation on the Territorial Sea, the Right of Innocent Passage and the Contiguous Zone*, Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, New York, 1995, 165-168, at 166-167. Oman has ratified the LOSC on 17 August 1989. In its 1981 Decree concerning the Territorial Sea, Oman refers to the "the principle of innocent passage" in relation to the passage of ships and aircraft of third States through international straits. Article 1, Royal Decree 15/81 concerning the Territorial Sea, Continental Shelf and Exclusive Economic Zone of 10 February 1981, *ibid.*, 254. Also see Oman's Declaration of 1 July 1983 at the time of signature of the LOSC, in *Multilateral Treaties Deposited with the Secretary-General* (New York: United Nations, 1989), 763-764.

³⁰The Strait of Bab-al-Mandeb is bordered by the Republic of Yemen and in the east and the Republic of Djibouti in the west. It connects the Red Sea and the Suez Canal to the Gulf of Aden and the Arabian Sea. The narrowest part of the Strait is approximately 14.5 miles (23 km) wide between the points of Bab-al-Mandeb (Yemen) on the Asian side and Siyan (Djibouti) on the African side. Lapidot, *op. cit.*, 130. Yemen and Djibouti ratified the LOSC on 21 July 1987 and on 8 October 1991 respectively.

not yet enacted any laws related to navigation through this Strait as an international strait under the LOSC.³¹ Its Act of 1977 (Article 6-10) only contains provisions on the right of innocent passage through its territorial sea.³² However, since the eastern waters of the Strait of Bab-al-Mandeb form part of the territorial sea of Yemen, it appears that the same Act applies to the Strait.³³ This means that in the view of Yemen the regime of innocent passage will

³¹The existing law of the other bordering State (Djibouti) on the maritime jurisdiction is Law No. 52/AN/78 of 9 January 1979 concerning the territorial sea, contiguous zone, exclusive economic zone, the maritime frontiers and fishing. This Law states that it does not change the existing international navigation rules in the Strait of Bab-al-Mandeb.

³²Act No. 45 of 1977 concerning the Territorial Sea, Exclusive Economic Zone, Continental Shelf and other Marine Areas, The Law of the Sea: National Legislation on the Territorial Sea, the Right of Innocent Passage and the Contiguous Zone, *op. cit.*, 419-422. Despite the statement of 7 July 1978 of the Foreign Minister of the People's Democratic Republic of Yemen, the 1977 Act is still in force. As part of the statement, the Minister stated that his Government respects "the freedom of maritime and air traffic of ships and aircraft of all coastal States and non-coastal States [through the Strait of Bab-al-Mandeb], without prejudice to the sovereignty, integrity, security, and independence of the Republic". UN Doc. NV/78/63, 7 July 1978.

³³Upon its signature of the LOSC on 10 December 1982, the Yemen Arab Republic declared that it "adheres to the rules of general international law concerning rights to national sovereignty over coastal territorial waters, even in the case of the waters of a strait linking two seas" (emphasis added). It also declared that its prior agreement is required for the passage of "nuclear-powered craft, as well as warships and warplanes through its territorial waters". *The Law of the Sea -- Straits Used for International Navigation: Legislative History of Part III of the United Nations Convention on the Law of the Sea*, Vol. II, 157.

be applicable to the Strait of Bab-al-Mandeb,³⁴ if the Act remains unchanged.³⁵

Spain, as one of the States bordering the Strait of Gibraltar, has been one of the strait States that has shown its opposition to proposed provisions on transit passage by maritime powers. In addition to its concerns pertaining to prevention of pollution resulting from ships, Spain indicated its opposition to overflight through straits during the UNCLOS III.³⁶ It has been said that the signing of the LOSC on 4 December 1984, by Spain shows that it has adopted "the principle of transit passage with respect to overflight too".³⁷ Treves argues that such acceptance is an indication that "transit passage is in the process of becoming part of customary law".³⁸ Such a

view seems to be questionable, since another possible argument is that Spain signed the LOSC, with an understanding that provisions on transit passage are only applicable to parties to this Convention. In addition, in 1984 it was too early to assess whether provisions on transit passage were becoming part of customary law, in particular with a view to the "package deal" nature of the LOSC. Although maritime powers strongly supported the provisions on the right of transit passage, the existence of different views on the status of transit passage did not create the circumstances under which transit passage could be categorised as "an instant custom."

An example which is relied upon to support the long application of transit passage is the flight of the American aircraft over the Strait of Gibraltar in 1986. At this time American aircraft flew over the Strait of Gibraltar in order to attack Libya. The bordering States of Spain and Morocco did not protest against the USA as a non-party to the LOSC.³⁹ As regards this case, three points should be considered.

Firstly, it seems that the situation was similar to a time of war. In other words, there was a tension between the USA and Libya that resulted in an air attack by the USA. In these critical situations, it does not appear that the rules of peace time are applicable. As a result, it does not seem that the rules of the law of sea relating to peace time can be necessarily enforceable in war-time and circumstances in wartime necessitate different treatment. *Secondly*, it is possible that the USA has convinced the officials of Spain and Morocco to use the

³⁴Lapidoth writes that the Strait of Bab-al-Mandeb links two parts of the high seas -- the Red Sea and the Gulf of Aden. He further states that it is also a strait which links the high seas in the Gulf of Aden to the territorial seas of States (Egypt, Ethiopia, Sudan, Saudi Arabia, Jordan, and Israel) which do not border the strait. Accordingly, he asserts that the Strait of Bab-al-Mandeb "would be subject to the regime of non-suspendable innocent passage for ships of commerce and war in time of peace and in time of an intermediary status between peace and war". However, he adds that by recognition of broader territorial seas, "the right of passage through international straits will be reinforced by the establishment of the regime of unimpeded transit passage". Lapidoth, *op. cit.*, 147.

³⁵The 1977 Act was legislated by the People's Democratic Republic of Yemen. On 22 May 1990, the People's Democratic Republic of Yemen and the Yemen Arab Republic became united and formed the Republic of Yemen. The Act seems to be considered as the enforceable Act of the Republic of Yemen. It was included in the UN publication of 1995 concerning national legislation on the territorial sea and the contiguous zone.

³⁶Treves, *op. cit.*, 973.

³⁷*Ibid.*, 974.

³⁸*Ibid.*

³⁹*Ibid.*, 975.

Strait of Gibraltar in such exceptional situations. As a result, the actions of American air force have been tolerated by the bordering States of Spain and Morocco. *Thirdly*, even if it is accepted that these States adopted the USA measures as an example of exercising a rule of customary law, this sample cannot affect the position of other strait States. This is because even if it is agreed that American aircraft were exercising the right of transit passage through the Strait of Gibraltar as an exercise of a customary right, it could only be considered as a regional customary law. Accordingly, it cannot be applied against other strait States which argue that transit passage is yet to be defined as a customary right.

It seems that the Strait of Gibraltar has been an example of a few straits which have been used for overflight, in addition to right of passage exercised by ships. However, it is not reasonable to extend its effects to other straits. In addition any claim on exercise of transit passage, as part of customary law, through other straits can be neutralised by continuous protests of the strait States. It should be noted that force should not be used as a means to influence the position of strait States and any differences should be resolved peacefully. It should be also pointed out if a strait State is a party to the LOSC, it cannot deny the right of parties to transit passage. The relation between this strait State and a non-party to the LOSC depends on the view of such State as to whether it recognises transit passage as a customary right or a right limited to the parties to the LOSC.

The case of the Straits of Dover is an obvious example where the strait States of the UK and France have recognised the

application of the transit passage through this Strait. The UK and France both have interests in extending the range of transit passage to all international straits. As regards the Straits of Dover these two countries have acted in a manner in consistent with the provisions of the LOSC on transit passage, even though they are not yet parties to the Convention. This practice is particularly in the line with their policy to expect other strait States to act similarly. In their joint declaration of 2 November 1988, France and the UK, *inter alia*, declared that:

The existence of a specific regime of navigation in straits is generally accepted in the current state of international law. The need for such a regime is particularly clear in straits, such as the Straits of Dover, used for international navigation and linking two parts of the high seas or economic zones in the absence of any other route of similar convenience with respect to navigation.

In consequence, the two Governments recognize the right of unimpeded transit passage for merchant vessels, State vessels and, in particular, warships following their normal mode of navigation, as well as the right of overflight for aircraft, in the Straits of Dover. It is understood that, in accordance with the principles governing this regime under the rules of international law, such passage will be exercised in a continuous and expeditious manner.⁴⁰

Although the UK and France recognised the application of transit passage to the Straits of Dover, the declaration does not include any reference as to the status of transit passage. In other words, the declara-

⁴⁰Joint Declaration by the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic of 2 November 1988, *The Law of the Sea: Current Developments in State Practice (No. III)*. Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, New York, 1992, 263.

tion does not state that transit passage is a customary right of passage through international straits. In general, States bordering straits are free to agree to provide a liberal regime of passage such as transit passage through straits adjacent to their territory, even if they are not parties to the LOSC. However, this approach is not yet the approach of all strait States. The lack of consistent approach by all State bordering international straits has prevented the regime of transit passage from being a rule customary law. As far as the Straits of Dover is concerned, the position of France and the UK can be relied upon for developing a regional custom with respect to the exercise of transit passage.

A multilateral treaty, which is worthy of note, is the *South Pacific Nuclear Free Zone Treaty* of 6 August 1985. Article 5(2) of this treaty provides that:

each Party in the exercise of its sovereign rights remains free to decide for itself whether to allow ... navigation by foreign ships in its territorial sea or archipelagic waters in a manner not covered by the rights of innocent passage, archipelagic sea lane passage or transit passage of straits.⁴¹

Traves argues that the parties to this treaty accepted, *inter alia*, transit passage existing law.⁴² Whatever the intention of the parties was, it does not necessarily reflect the position of other States. Further, it does not affect non-parties in accordance with Article 34 of the Law of Treaties. Although multilateral treaties have more enforceable power than those which are bilateral, their effects are no more than the ef-

fects of contractual rules. State practice and *opinio juris* make customary rules, and treaties confirm these rules. Although rules of treaties can be the basis for State practice over time, they cannot primarily create customary rules. To become part of customary law, such rules must be exercised to a large extent and States should believe that the observance of these rules is legally binding for them in their relations.

In conclusion, it is obvious that the period after codification of the LOSC has not produced sufficient State practice on transit passage to prove that it has become customary law. It seems that the major reason for the lack of adequate State practice with respect to transit passage may have come from the long period it took for the LOSC to come into force on 16 November 1994. The entry into force of the Convention may create more opportunities for practical tests of transit passage to assess whether this passage has acquired the nature of a customary rule. It is clear that, in the period before entry into force of the LOSC, the TSC (which refers to customary right of non-suspendable innocent passage through international straits) has governed passage through international straits.⁴³ However, since 16 November 1994 when the LOSC came into force, the LOSC replaced the TSC for parties to both Conventions. For non-parties to the LOSC the customary right of innocent passage through international straits continues to be exercised in these straits, unless the right of transit passage is recognised by the international com-

⁴¹Traves, *op cit.*, 975.

⁴²*Ibid.*

⁴³Article 16(4) of the TSC. The basis of this provision is the decision of the ICJ in the *Corfu Channel Case*. See *The Corfu Channel Case* (UK v. Albania), *ICJ Reports*, 1949, 4-38, at 28.

munity as crystallised into customary international law.

General Conclusion

It is clear that the origins of innocent passage and transit passage are not identical. Although innocent passage has a deep root in traditional law of the sea, transit passage (as is reflected in the LOSC) is a new product of recent evolutions and developments in the law of the sea. Whatever has been the reason for the creation of transit passage, consideration of this regime of passage through international straits as a rule of customary law is still controversial. Although some legal scholars, such as O'Connell,⁴⁴ consider transit passage to be part of customary law, other legal scholars, such as Brownlie,⁴⁵ Strake,⁴⁶ Yturriaga, and Larson⁴⁷ consider transit passage to be a

new regime of passage through international straits.⁴⁸ A similar view is also asserted with respect to the right of archipelagic sea lane passage. For example, Larson writes that:

... while an earlier form of innocent passage exists in customary international law, the concepts of transit and archipelagic sea lanes passage do not effectively exist in customary international law outside of the 1982 Convention.⁴⁹

There is also a new approach argued in support of the USA's position. Harlow relies on the language of the relevant provisions of the LOSC to argue that the drafters of the Convention considered these provisions to have universal application, and accord-

tomary international law of the sea. Larson, David L., "Conventional, Customary, and Consensual Law in the United Nations Convention on the Law of the Sea (Comment)", *Ocean Development and International Law* 25 (1994): 78. Although Larson considered transit passage among international customs in 1994, he did not consider this regime of passage as customary law in 1987. It does not seem that the passage of 7 years has produced any significant change in creating a uniform approach by States on the status of transit passage, to conclude that the regime of transit passage has crystallised as an international custom. Although many States have favoured transit passage through straits used for international navigation, such trends are based on the provisions of the LOSC rather than being based on any potential customary status for the right of transit passage.

⁴⁸Grunawalt alleges that "[t]he ships and aircraft of the United States and other maritime nations have always had, and have always exercised, the right to transit through, over, and under international straits". Grunawalt, Richard J., "United States Policy on International Straits", *Ocean Development and International Law* 18, no. 4 (1987): 458. However, he does not mention where and when "these rights" have been exercised and whether there is enough evidence to prove such a claim. There have been exceptional cases such as in the Strait of Gibraltar where American ships and aircraft exercised a passage as an exercise of transit passage.

⁴⁹Larson, *op. cit.*, 1987, 414.

⁴⁴O'Connell writes that "[t]he concept of transit passage in the Draft Convention (1980) restores the position in customary law ...", O'Connell, D.P., *The International Law of the Sea*. Edited by: Ivan Antony Shearer, Vol. 1 (Oxford: Clarendon Press, 1982), 299.

⁴⁵Brownlie states that "the provisions of the 1982 Convention concerning transit passage involve a substantial departure from the position of customary international law and can not be involved by non-parties". Brownlie, Ian, *Principles of Public International Law*, Fourth Edition, Clarendon Press, Oxford, 1995, p. 284. He also points out that "while in principle the regime [of transit passage] could be confirmed as customary law by state practice independently of the [1982] Convention, there is no evidence of a trend in this direction". *Ibid.*

⁴⁶Strake, J.G., *Introduction to International Law*, Tenth Edition (London: Butterworths, 1989), 266.

⁴⁷Larson, David L., "Innocent, Transit, and Archipelagic Sea Lanes Passage", *Ocean Development and International Law* 8, no. 4 (1987): 427. In his article published in 1994, however, Larson included the transit passage as among rules of cus-

ingly non-parties to the LOSC can benefit from these provisions.⁵⁰ He relies on Article 36 (with heading Treaties providing for rights for third states) of the Law of the Treaties that provides:

1. A right arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to accord that right either to the third States, or to a group of States to which it belongs, or to all States, and the third States assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides.
2. A state exercising a right in accordance with paragraph 1 shall comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty.

Harlow claims that "the navigation and overflight provisions refer to 'states' in general and 'all ships and aircraft'."⁵¹ He argues that the intention of the drafters of the LOSC was "to extend rights [of transit passage] to the third states, assuming that the third State assents to the rights extended and complies with the conditions for their exercise".⁵² Although Article 17 (Right of innocent passage) refers to "*ships of all States*", Article 38 (Right of transit passage), paragraph 1, refers specifically to "*all ships and aircraft*" and there is no references to "State". As a result, it can be argued that the intention of the drafters is that only the parties to the 1982 Convention can enjoy provisions relating to transit passage, otherwise they would have referred to "ships and aircraft of all States". In addition, Article 36 (1) of the Law of the Treaties

refers to "intention of the parties" and not intention of the drafters. Therefore, the parties to the LOSC have to decide whether non-parties can enjoy provisions on transit passage.

As was indicated it was, in fact, the USA which first advanced the argument that the right of transit passage is a customary right. The argument was developed to ensure enjoyment by the USA of the provisions of the LOSC on the right of transit passage, in case it decided to stay out of the LOSC. In a practical sense, the only legal solution for the USA to enable it to enjoy the provisions on transit passage in the LOSC has been to claim that these provisions, as well as other navigational provisions, are part of customary law. As Larson writes:

Although the United States is not a signatory to the UN Convention, it has tried unilaterally to assert its rights of transit passage as outlined in the "Fact Sheet [on] United States Ocean Policy" of 10 March 1983.⁵³

At present, transit passage is not part of customary law. Although more States are adhering to the provisions of the LOSC on the right of transit passage, the claim that transit passage is becoming a customary rule is not yet certain. This is because there is not yet adequate State practice to support such a claim. The reality is that passage of time and uniform practices of States will answer the question as to whether transit passage has the ability to become part of customary law. Any rule may become customary, if States have the desire to confer customary status on the rule and *opinion juris* confirms it.

⁵⁰Harlow, Bruce A., "Comment", *Law and Contemporary Problems* 46, no. 2 (1983): 128.

⁵¹*Ibid.*, 128-129.

⁵²*Ibid.*, 129.

⁵³Larson, David L., "Naval Deapony and the Law of the Sea", *Ocean Development and International Law* 18, no. 2 (1987): 143.

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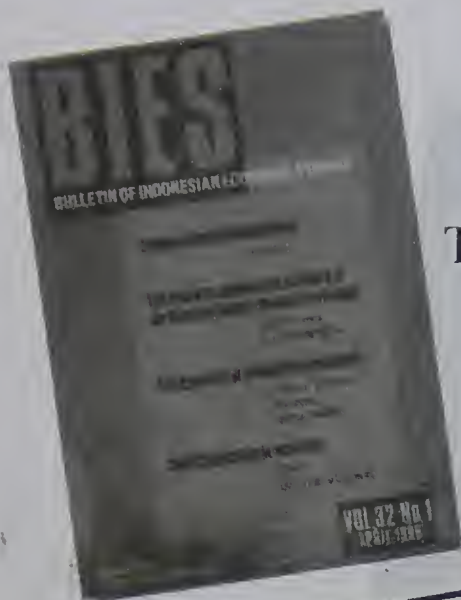
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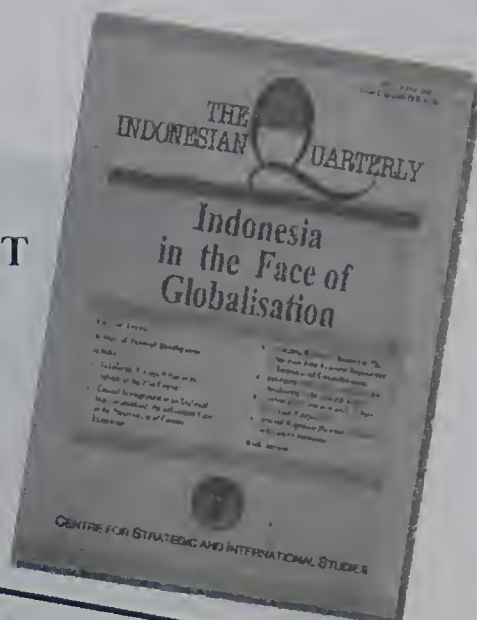


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